TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted] 27

WADLEY SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF GEORGIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

FILED MARCH 20, 1912.

(23,137)

(23,137)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 223.

WADLEY SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF GEORGIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 17, 1913.

1 Superior Court of Jefferson County, Georgia, November Term, 1910.

STATE OF GEORGIA
vs.
WADLEY SOUTHERN RAILWAY CO.

Suit for Penalty.

Bill of Exceptions.

Be it remembered, that the above stated cause came on for trial at the November Term, 1910 of said court before the Honorable B. T. Rawlings, Judge presiding therein, and a jury, on November 16, 1910. On November 17, 1910, at the conclusion of the case, the jury rendered a verdict finding the defendant guilty, and the court assessed and entered judgment in favor of the State of Georgia for a penalty in the sum of $1,000.00, all during the November Term of said court.

On January 11th, 1911, within the time allowed by law, a bill of exceptions pendente lite was duly presented by the defendant to the Judge of said court, certified by him, made a part of the record, and filed in the clerk's office of said court. Said bill of exceptions pendente lite contained the exceptions of the defendant to the following rulings made by the court during the trial of said cause:—

1. The court overruled the objection of defendant's counsel to the admission of certain testimony of one O. L. Anderson, a witness for the State, and admitted the said testimony, the details thereof being specified in full in the bill of exceptions pen-
2 dente lite.

2. The court sustained the objection of the counsel for the State to the admission of certain testimony of one H. A. Jordan, a witness for the defendant, and excluded the said testimony, the details thereof being set out in full in the bill of exceptions pendente lite.

3. The court overruled, without opinion, the motion for a nonsuit made by the defendant at the conclusion of the evidence submitted on behalf of the State, the ground of the said motion and the action of the court thereon being set out in full in the said bill of exceptions pendente lite.

After verdict and judgment and during the term of the court, the defendant filed its motion for new trial containing three grounds. Rule to show cause thereon was immediately issued and served, and the court passed an order assigning the said motion for hearing at chambers on January 21st, 1911, with permission to the movant to amend said motion and to file a brief of the evidence at any time at or before the said 21st day of January, 1911. Within the period named, the defendant filed a brief of the evidence, which was agreed to by both parties and approved by the court, and also

filed an amendment to its motion for a new trial containing
3 fifteen additional grounds. All the grounds of the original and amended motion for a new trial were approved by the court, as was likewise a copy of the charge of the court, which by order of the court has been made a part of the record and filed as such.

Said motion for a new trial was duly heard by the said Judge, Honorable B. T. Rawlings, on the 21st day of January, 1911, and overruled and denied.

And now, within the thirty days after the refusal and denial of the said motion for new trial comes the defendant, Wadley Southern Railway Company, and excepts to the following rulings, orders and judgments of the court, and says that the court erred in:—

1. The overruling of the objection by the defendant to the testimony of O. L. Anderson, as set out in the bill of exceptions pendente lite.

2. The exclusion of the testimony of H. A. Jordan, as set out in the bill of exceptions pendente lite.

3. The refusal to grant the defendant's motion for non-suit as set out in the defendant's bill of exceptions pendente lite.

4. The overruling of the defendant's motion for new trial and the refusal to grant the same on each ground thereof.

The following portions of the record are specified as ma-
4 terial to a clear understanding of the errors complained of:

1. The original petition with the exhibits thereto.

2. The answer of the defendant and the amendment thereto filed on November 16th, 1910.

3. The bill of exceptions pendente lite with the certificate thereto.

4. Defendant's motion for new trial and the amendment thereto.

5. The brief of evidence.

6. The charge of the court.

7. The verdict of the jury and the judgment of the court thereon.

8. The order of the court overruling and denying the motion for new trial.

Wherefore, the defendant now presents this its bill of exceptions and prays that the same may be signed and certified as required by law, in order that the errors complained of may be considered and corrected by the Supreme Court of Georgia.

LAWTON & CUNNINGHAM,
Attorneys for Plaintiff in Error.

P. O. Address, Savannah, Ga.

5 I do certify that the foregoing bill of exceptions is true, and specifies all of the evidence and all of the record material to a clear understanding of the errors complained of; and the clerk of the superior court of Jefferson county is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill ofexceptions specified, and certify the same as such, and

cause the same to be transmitted to the March Term, 1911 of the Supreme Court of Georgia, that the errors alleged to have been committed may be considered and corrected.

This 7th day of February, 1911.

B. T. RAWLINGS,
Judge Superior Court, Jefferson County.

Due and legal service of the within bill of exceptions and copy thereof are hereby acknowledged. This Feb'y 11, 1911.

JAMES K. HINES,
Attorney for the State of Georgia and Defendant in Error.

(Endorsed:) Filed in office Feb'y 18, 1911. W. S. Murphey, Clerk Superior Court, Jefferson Co., Ga.

6 Clerk's Office Superior Court of Jefferson County.

LOUISVILLE, GA., *February 18th,* 1911.

I hereby certify that the within and foregoing is the true original bill of exceptions, filed in this office, in the case therein stated, and that a copy thereof has been made and is now of file in this office.

Witness my signature and the seal of said court hereto affixed, the day and year last above written.

[SEAL.] W. S. MURPHY, *Clerk.*

7 (Endorsed:) No. 6 Middle Circuit. October Term, 1911. Supreme Court of Georgia. Wadley Southern Ry. Cp. v. State of Georgia. Bill of Exceptions. Filed in Office March 2, 1911. W. E. Talley, D. C. S. C. Ga.

8 *First. The Original Petition, with the Exhibits Thereon.*

GEORGIA,
Jefferson County:

To the Superior Court of said County:

The State of Georgia complains of the Wadley Southern Railway Company, and shows the following facts, towit:

1. The Wadley Southern Railway Company is a railroad corporation, duly chartered under the laws of said State, and having its principal office and place of business in the town of Wadley, said State and county. Said company owns and operates lines of railway in said county.

2. This suit is brought in the name of the State of Georgia, by direction of his Excellency, Joseph M. Brown, Governor of said State, under and by virtue of, an executive order, passed April 18, 1910, as will more fully appear from a copy thereof, hereto attached, marked Exhibit A, and made a part of this petition.

3. On March 11, 1910, the Railroad Commission of Georgia passed its order, wherein it is recited and stated that the said

Wadley Southern Railway Company discriminates against shippers to Adrian, Georgia when goods are consigned and shipped to that place over the railway of the Macon, Dublin and Savannah Railway Company to Rockledge, and thence over the line of the Wadley Southern Railway Company to Adrian, a station on the latter company's line, and in favor of shippers over the line of the Central of Georgia Railway Company, to Wadley, Georgia, and thence over the line of said Wadley Southern Railway Company to Adrian, Georgia, wherein it is alleged that the unlawful discrimination arises out of the requirement of the Wadley Southern Railway Company that shippers shall prepay freight charges to Rockledge before said company will receive freight at that point from the Macon, Dublin and Savannah Railroad Company, consigned to Adrian, but does not require a like prepayment of charges on freight received by said company from the Central of Georgia Railway Company at Wadley, Georgia, consigned to Adrian, Georgia, thus affording facilities to the patrons of the Central of Georgia Railway Company for the interchange of freight at Wadley, Georgia, which are denied to the patrons of the Macon, Dublin and Savannah Railway Company for the interchange; wherein it is alleged that the Macon, Dublin and Savannah Railroad Company's route via Rockledge is a competitor of the Central of Georgia Railway Company's route via Wadley for freight moving to Adrian and other points on the Wadley Southern Railway Company between Rockledge and Wadley; wherein it is alleged that said requirement of the Wadley Southern Railway Company is intended to afford and does afford the patrons of the Central of Georgia Railway Company facilities denied to the patrons of the Macon, Dublin and Savannah Railroad Company, a connecting line of the Wadley Southern Railway Company, and the competitor of the Central of Georgia Railway Company for the Adrian business, which interferes with the exercise of freedom of choice of routes by shippers, wherein the commission on the day aforesaid, ordered the said Wadley Southern Railway Company at once to desist from the discrimination specifically complained of, on and after the receipt of said order; and wherein the Commission further ordered that the said Wadley Southern Railway Company on or after the receipt of said order should afford to patrons or shippers over the line of the Macon, Dublin and Savannah Railroad Company via Rockledge the same facilities for the interchange of freight afforded to patrons or shippers, over the line of the Central of Georgia Railway Company via Wadley, Georgia. A copy of said order is hereto attached, marked Exhibit B, and made a part of the petition, with the usual leave of reference.

4. On March 12th, 1910, said order was sent by the Railroad Commission of Georgia to the said Wadley Southern Railway Company; and the same was duly received by said company on March 13th, 1910, whereupon it became and was the duty of the said Wadley Southern Railway Company to obey, observe and comply with the said order of the Railroad Commission of Georgia.

5. The Railroad Commission of Georgia passed said order under

and by virtue of the Act of the General Assembly of Georgia, entitled "An Act to increase the membership of the Railroad
11 Commission of Georgia, and to prescribe qualifications for membership, etc.," duly approved August 22nd, 1907, whereby said Railroad Commission of Georgia is empowered and authorized to require all common carriers and other public service companies, under their supervision, to establish and maintain such public service and facilities as may be reasonable and just, either by general rules or by special orders in particular cases; under and by virtue of the Act of the General Assembly of Georgia, entitled "an Act to provide for the regulation of railroad freight and passenger tariffs, etc.," duly approved August 14, 1879, whereby it is made the duty of said commission to make such just and reasonable rules and regulations as may be necessary for preventing unjust discrimination in the transportation of freight and passengers by the railroads of this State; and under and by virtue of the act of the General Assembly of Georgia, entitled "an Act to prevent monopolies in the transportation of freights and to secure free competition in the same, and for other purposes," duly approved Feb. 28th, 1874.

6. On April 4, 1910, said Wadley Southern Railway Company formally notified the Railroad Commission of Georgia that it declined to obey, observe and comply with said order of said Commission. On divers days before said date, and since, the Wadley Southern Railway Company has failed and still fails and re-
12 fuses to obey, observe and comply with said order.

7. Whereby the said Wadley Southern Railway Company became and is indebted to the State of Georgia in a sum not to exceed Five Thousand Dollars ($5,000), the amount to be fixed by the presiding Judge who may try this case, by way of penalty for its refusal to obey, observe and comply with the order aforesaid; and whereby an action accrued to the State of Georgia, according to the provisions of the Act of the General Assembly of said State, entitled, "an Act to increase the membership of the Railroad Commission of Georgia, and to prescribe the qualifications of membership, to authorize the designation thereof of the Chairman by the Governor, and to prescribe his duties and compensation, to revise, enlarge, and more clearly define the powers, duties and rights of said Commission; to authorize it to employ rate and other experts, and to fix their pay, to increase the printing fund and the salary of the Secretary of the Commission; to employ a stenographer and to fix his pay; to extend its powers and jurisdiction over docks, wharves, terminal companies, cotton compress companies, corporations, or persons owning, leasing, or operating railway terminals or terminal stations, etc.," duly approved August 22nd, 1907. For further cause of action the State of Georgia complains of the Wadley Southern Railway Company, and shows the following facts, towit:

13 1. The Wadley Southern Railway Company is a railroad corporation, duly chartered under the laws of said State, and having its principal office and place of business in the town of Wad-

ley, said State and county. Said company owns and operates lines of railway in said county.

2. This suit is brought in the name of the State of Georgia, by direction of his Excellency, Joseph M. Brown, Governor of said State, under and by virtue of executive order passed April 18th, 1910, as will more fully appear from a copy thereof hereto attached, marked Exhibit A, and made a part of this petition.

3. The Wadley Southern Railway Company is incorporated under the laws of said State, and owns and operates a railroad line from Wadley, Georgia, where it connects with the Central of Georgia Railway Company, to Rockledge, Georgia, a distance of thirty-seven miles, where it connects with the Macon, Dublin and Savannah Railway Company, and a line of railway from Wadley, Georgia, where it connects with the Central of Georgia Railway Company, to Collins, Georgia, a distance of fifty-four miles, where it connects with the Seaboard Air Line Railway Company. The Wadley Southern Railway Company is the consolidation of two corporations, towit: the
14 Wadley and Mt. Vernon Railroad Company, which formally owned and operated the first of the above mentioned lines of railway, and the Stillmore Air-Line Railway Company, which operated the latter of the above mentioned lines of railway. Both of said companies were incorporated under the railroad laws of this State. The consolidation of the said two companies was effected on or about July 1, 1906, when the Stillmore Air-Line Railroad Company conveyed all of its property and assets to the Wadley and Mt. Vernon Railroad Company, which last named company, on or about July 1, 1906, changed its name to the Wadley Southern Railway Company.

4. Prior to the consolidation of the Wadley and Mt. Vernon Railroad Company, and the Stillmore Air-Line Railway Company, as above stated, said companies were active competitors of the Central of Georgia Railway Company for business originating at Wadley, and to other points on said Wadley and Mt. Vernon Railroad Company, and destined for Macon, Georgia and other points north and west, via Macon, Dublin and Savannah Railway Company, and for freight and passengers, originating and starting at Wadley, Georgia and other points along the Stillmore Air-Line Railway Company, for Savannah and other points east and north, via the Seaboard Air Line Railway Company.

15 5. When said Wadley and Mt. Vernon Railroad Company and the Stillmore Air Line Railway Company were thus consolidated, the Central of Georgia Railway became and is still the owner of the entire capital stock of said Wadley Southern Railway Company; and is the owner and holder of the entire bonded indebtedness of said Wadley Southern Railway Company.

6. Said Wadley Southern Railway Company connects with said Macon, Dublin and Savannah Railway Company at Rockledge, Georgia, and said two companies at said place have switches connecting their respective lines of railway for the interchange of freights.

At said point said companies have a joint agent for the conduct and transaction of their respective businesses at said junction point.

7. Prior to the aforesaid consolidation of the Wadley and Mt. Vernon Railroad Company, and the Stillmore Air Line Railway Company said former company received all freights from the Central of Georgia Railway Company, and from the Macon, Dublin and Savannah Railway Company for points of destinated along its said line of railway from Wadley to Rockledge, Georgia, without requiring patrons of and shippers over said Central of Georgia Railway Company, and said Macon, Dublin and Savannah Railway Company to prepay the freight charges on such shipments of goods and merchandise, and said Wadley and Mt. Vernon Railroad Company afforded the like usual and customary facilities for the interchange of
16 freights to patrons of each of said lines so connecting with it at Wadley and Rockledge, as aforesaid:

8. From July 1st, 1906 to July 8th, 1909, said Wadley Southern Railway Company interchanged freights with said Macon, Dublin and Savannah Railway Company, its connecting line, at Rockledge, and received from said latter company and transported all freights to points of destination along its line of railway with- requiring the prepayment of freight.

9. On July 8th, 1909, and long prior thereto it was and had been customary and usual for connecting railways in this State, when freight was shipped over one line and was to be delivered to another line, and by the latter to be transported to destination, to deliver freight coming from the initial road to the railway without prepayment of freight charges. It was and still is usual and customary for the initial carrier not to require the payment of freight before delivering goods to the delivering carrier, but on the contrary it was and still is usual and customary for the delivering carrier to collect all freight charges for the whole service from the consignee at the point of destination.

10. On or about July 6th, 1909, and ever since said date, the Wadley Southern Railway Company has refused and still refuses to receive freight from the Macon, Dublin and Savannah Railway Company at Rockledge, Georgia, for points on its line without pre-
17 payment of the freight, while during all said period said company has received and still receives from the Central of Georgia Railway Company at Wadley, Georgia, all freights shipped from Macon, Georgia and other points, to points along its line of railway, without prepayment of freight. In this way said Wadley Southern Railway Company discriminates against said Macon, Dublin and Savannah Railway Company, one of its connecting lines, in favor of the Central of Georgia Railway Company, another of its connecting lines, and thus fails and refuses to afford the usual and customary facilities for interchange of freight to the patrons of each of said routes and lines alike.

11. Whereby said Wadley Southern Railway Company has violated the Act of the General Assembly of Georgia, entitled, "An Act to prevent monopolies in transportation of freight, and to secure free

competition in the same, and for other purposes," duly approved Feb. 26th 1874, whereby the Wadley Southern Railway Company became and is indebted to the State of Georgia in an amount not to exceed the sum of Five Thousand ($5,000) Dollars, to be fixed by the presiding Judge, who shall try this case, and whereby an action accrued to the State of Georgia according to the provisions of the Act of the General Assembly of Georgia entitled "An Act to increase the membership of the Railroad Commission of Georgia, and to prescribe the qualification for membership, to authorize the designation of
18 a Chairman thereof by the Governor, and to prescribe his duties and compensation; to revise, enlarge, and more clearly define the powers, duties and rights of said commission, etc." duly approved August 22nd, 1907.

12. Wherefore petitioner prays judgment, and that process may issue, requiring the Wadley Southern Railway Company to be and appear at the next superior court to be held in and for said county on the second Monday in November, 1910, then and there to answer petitioner's complaint.

JAMES K. HINES,
Special Attorney for the Railroad Commission of Georgia, Attorney for Petitioner.

EXHIBIT A.

In re Wadley Southern Railway Company Refusal to Accept at Rockledge, Georgia, Freight from the Macon, Dublin and Savannah Railway Company Unless Freight Charges are Prepaid.

Whereas the Railroad Commission of Georgia having notified me that the Wadley Southern Railroad Company had refused to obey the order of said Commission, directing that said railway company should receive freight from the Macon, Dublin and Savannah Railroad Company without requiring prepayment of freight charges, which refusal it is claimed by such Commission is an un-
19 authorized and illegal discrimination under the facts, and subjecting the said company to a penalty for a violation of the Commission's orders.

It is therefore ordered in conformity with the Act approved August 23rd, 1907, that suit be instituted by the Special Attorney of the Railroad Commission in the name of the State of Georgia for the recovery of such penalty.

Witness my hand as Governor *of* the Executive Seal of this State, this the 16th day of April, 1910.

[SEAL.] JOSEPH M. BROWN, *Governor.*

Executive Department, Georgia.

By the Governor:

BENJAMIN M. BLACKBURN,
Secretary Executive Department.

EXHIBIT B.

File 8957.

MARCH 11*th*, 1910.

In re Refusal of the Wadley Southern Railway Company to Accept Freight from the Macon, Dublin and Savannah Railroad Company at Rockledge, Georgia, Without the Prepayment of Freight Charges.

The Commission having heard evidence and argument of counsel in the foregoing complaint as to discrimination alleged to be practiced by the Wadley Southern Railway Company at against
20 shippers to Adrian, Georgia, over the line or route of the Macon, Dublin and Savannah Railroad Company via Rockledge, Georgia, and in favor of shippers over the line or route of the Central of Georgia Railway Company, at Wadley, Georgia, and it appearing that the alleged unlawful discrimination arises out of the requirement of the Wadley Southern Railway Company that all shippers shall prepay charges via Rockledge before it will receive freight at that point from the Macon, Dublin and Savannah Railroad Company for Adrian, but does not require like prepayment of charges on freight via the Central of Georgia Railway Company at Wadley, thus affording facilities to patrons of the Central of Georgia Railway Company's line or route, for the interchange of freight denied to patrons of the Macon, Dublin and Savannah Railroad's Company's line or route, and it appearing that the Macon, Dublin and Savannah Railroad Company's line or route via Rockledge is a competitor of the Central of Georgia Railway Company's route or line via Wadley for freights moving to Adrian and other points on the Wadley Southern Railway Company between Rockledge and Wadley, and that the rule or requirement of the Wadley Southern Railway Company complained of is intended to afford and does afford to patrons of the Central of Georgia Railway Company facilities denied to patrons of the Macon, Dublin and Savannah Railroad Company, a connecting line of the Wadley Southern
21 Railway Company, and a competitor of the Central of Georgia Railway Company for Adrian business, which interferes with the exercise of the freedom of choice in routes by shippers, the commission is of the opinion that the practice complained of is, under the laws of Georgia, an unlawful discrimination, and such a discrimination as the Commission is required by law to forbid. It is therefore

Ordered, That the Wadley Southern Railway Company at once desist from the discrimination specifically complained on in this case.

Ordered further, that the Wadley Southern Railway Company on and after the receipt of this order, afford to patrons or shippers over the line of the Macon, Dublin and Savannah Railroad Company via Rockledge, the same facilities for the interchange of freight

afforded to patrons or shippers over the line of the Central of Georgia Railway Company via Wadley.

By order of the Board:

H. WARNER HILL, *Chairman.*

CAMPBELL WALLACE, *Secretary.*

22 GEORGIA,
Jefferson County:

THE STATE OF GEORGIA
v.
THE WADLEY SOUTHERN RAILWAY COMPANY.

Complaint for Penalty.

To the Sheriff or his lawful Deputy of said County, Greeting:

The defendant, the Wadley Southern Railway Company, of said county, is hereby required personally or by attorney, to be and appear at the next superior court, to be held in and for said county, on the second Monday in November, 1910, to answer the plaintiff's complaint, as in default thereof the court will proceed as to justice shall appertain. Herein fail not.

Witness the Hon. B. T. Rawlings, Judge of said court, this the 26th day of May, 1910.

W. S. MURPHY,
Clerk, S. C. J. C.

Filed in office May 26th, 1910.
W. S. MURPHY,
Clerk S. C. Jefferson County, Georgia.

23 2. *The Answer of the Defendant and the Amendment Thereto.*

Filed on Nov. 16th, 1910.

In Superior Court of Jefferson County, Nov. Term, 1910.

STATE OF GEORGIA
v.
WADLEY SOUTHERN RAILWAY COMPANY.

The Answer of the Wadley Southern Railway Company to the First Count of the Petition in the Above-stated Case.

1. The defendant admits the allegations of the first paragraph of the petition, except that the principal office of the company is in the Town of Wadley, the principal office of the company is in the city of Savannah.

2. The defendant admits the allegations of the second paragraph.

3. The defendant admits that the Railroad Commission of Georgia passed the order attached to the petition and marked Exhibit B, but does not admit either the recitals of fact or the conclusions of the order.

It is denied that any discrimination of any kind whatever was practiced against shippers to Adrian, or that any requirement was ever made by the defendant that shippers who shipped to Adrian via Rockledge and the Macon, Dublin and Savannah Railroad should prepay charges; or that any facilities were denied to the patrons of the route via Rockledge that were afforded to
24 patrons of the route via Wadley, or that it interfered with the freedom of choice of routes by shippers.

The Wadley Southern did and still does decline to advance to the Macon, Dublin and Savannah Railroad Company the freight charges earned by the Macon, Dublin and Savannah Railroad Company on shipments destined to Adrian, and turned over by the Macon, Dublin and Savannah Railroad Company at Rockledge to the Wadley Southern Railway Company to be transported to Adrian from Rockledge by the Wadley Southern Railway Company. This was the occasion of the complaint upon which the order of the Railroad Commission was predicated, but in promulgating its order the Commission used the language of the Act of Feb. 28th, 1874, and ordered the Wadley Southern Railway Company to "afford to patrons or shippers over the line of the Macon, Dublin and Savannah Railroad Company via Rockledge, the same facilities for the interchange of freight afforded to patrons or shippers over the line of the Central of Georgia Railway Company via Wadley," thus interpreting the refusal to advance the charges of the Macon, Dublin and Savannah Railroad Company at Rockledge, and the advancing of the charges of the Central of Georgia Railway Company at Wadley, as a refusal to afford the patrons of the one route "the usual and like customary facilities for interchange of freight" afforded the patrons of
25 the other route, whereas the thing which the Wadley Southern Railway Company has refused to do is not within either the letter or the spirit of the said Act of 1874 properly interpreted, nor it is required by any other law of the State of Georgia.

4. It is admitted that on March 12th, 1910, said order of the Railroad Commission was sent by it to the defendant, and was received on March 13th, 1910, but it is denied that there was any obligation on the defendant to comply with said order. Defendant has refused to advance the freight charges of the Macon, Dublin and Savannah Railroad Company at Rockledge, and does advance the charges of the Central of Georgia Railway Company at Wadley. This is not in conflict with the order. The order requires the defendant to desist from a thing which it never did do, and therefore could not be obeyed.

5. The defendant denies that the Railroad Commission of Georgia is empowered to pass said order by the special provision (quoted in the fifth paragraph of the first count) of the Act approved August 22nd, 1907, or by any other provision of said Act.

The defendant denies that the Railroad Commission of Georgia is

empowered to pass said order by the special provision (quoted in the fifth paragraph of the first count) of the Act approved Oct. 14th, 1879, or by any other provision of said Act.

26 The defendant denies that the Railroad Commission of Georgia was empowered to pass said order by the Act approved Feb. 28th, 1874. No power of any kind is conferred upon the Railroad Commission by said Act of 1874, and the Railroad Commission has no power to pass any order in respect thereto, nor has the Railroad Commission any power to enforce any of the provisions of the said Act of 1874. The only remedy conferred by the said Act being a right of action to the owner or consignee.

6. The defendant admits that on April 4th, 1910, the Wadley Southern *Southern* Railway Company formally notified the Railroad Commission of Georgia that it declined to obey, observe and comply with said order of said Commission, the fact being that the defendant never did do the thing which the order required the defendant to desist from doing, the only thing which the defendant had refused to do being to advance the charges of the Macon, Dublin and Savannah Railroad Company at Rockledge. The defendant has never demanded as a condition of the acceptance of freight at Rockledge from the Macon, Dublin and Savannah Railroad Company that defendant's charges should be prepaid, or that the charges of the Macon, Dublin and Savannah Railroad Company should be prepaid. The only thing which the defendant has refused to do was to advance to the Macon, Dublin and Savannah Railroad

27 Company the charges earned by it up to Rockledge.

7. The defendant denies that it has become indebted to the State of Georgia in any sum of money by way of penalty by its refusal to comply with the said order, and denies that any action has accrued to the State of Georgia thereby under the Act approved August 22nd, 1907.

And for further answer to the first count of the petition, the defendant says:

8. The defendant has the right to refuse to advance and pay to the Macon, Dublin and Savannah Railroad Company the freight charges which have accrued on its line on shipments to Rockledge, when such shipments are destined to Adrian.

There is no law which requires the defendant to pay out its money to the Macon, Dublin and Savannah Railroad Company for freight charges earned by that railroad, and to recoup itself out of the shipper or consignee.

The defendant has the right to refuse to give credit to the Macon, Dublin and Savannah Railroad Company. The matter of the advance of freight charges by one carrier to another is a matter of contract, and whenever it is done it is the voluntary act of the carrier. To compel the Wadley Southern Railway company to advance the charges of the Macon, Dublin and Savannah Railroad Company is equivalent to imposing upon it a contract which

28 it does not desire to make, and is further equivalent to establishing a through route and joint arrangement between the Wadley Southern Railway Company and the Macon, Dublin and

Savannah Railroad Company on freight destined to Adrian via Rockledge.

The defendant declined to advance the freight charges of the Macon, Dublin and Savannah Railroad Company in the first instance, because of the great number of shipments which were overcharged by the Macon, Dublin and Savannah Railroad Company, which required the defendant to collect the overcharges from the consignees at destination, entailing considerable trouble and expense.

The defendant has the right to prefer its connection with the Central of Georgia Railway Company via Wadley, and such a preference is not an unlawful discrimination, either against the Macon, Dublin and Savannah Railroad Company, or against shippers or patrons of the route via Rockledge. It is to the manifest interest of the Wadley Southern Railway Company that freight should move to Adrian through Wadley rather than through Rockledge, because when it moves through Wadley the defendant has a haul over its railroad of twenty-seven miles, while if it moves through Rockledge the defendant has a haul of only ten miles. It is therefore to the obvious interest of the defendant that freight should move via Wadley to Adrian. In addition, its arrangement and connection with the Central of Georgia Railway Company at
29 Wadley are satisfactory, and its connection with the Macon, Dublin and Savannah Railway Company at Rockledge *are* unsatisfactory. Shippers to Adrian have a satisfactory through route via the Central of Georgia Railway Company and Wadley, and it is not unlawful discrimination on the part of the defendant to arrange its contracts with its connections so that freight will move by preference through Wadley rather than through Rockledge.

9. The order of the Railroad Commission is not confined to business which originates and ends within the State of Georgia. It covers business both interstate and intrastate. The defendant, therefore, pleads that the order of the Commission is contrary to Article 1, Section 8, paragraph 3 of the Constitution of the United States, which provides that "the Congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes," and the said order of the Railroad Commission is unconstitutional, null and void, in that it is an attempt on the part of the Railroad Commission of Georgia to interfere with and regulate commerce among the several States, contrary to the provision of the Constitution of the United States above quoted.

30 10. Under the Act of the State of Georgia, approved Aug. 22nd, 1907, which is the act under which the State of Georgia asserts the right to institute this penalty suit, it is provided that any common carrier "which fails, omits or neglects to obey, observe and comply with any order or direction or requirement of the Commission heretofore or hereafter passed shall forfeit to the State of Georgia a sum not more than Five Thousand ($5,000.00) Dollars for each and every offence, the amount to be fixed by the presiding judge. Every violation of the provisions of this Act or of any preceding Act, or of any such order, direction or require-

ment of the Railroad Commission shall be a separate and distinct offense, and in case of a continued violation, every day a violation thereof takes place shall be deemed a separate and distinct offense.

Said Act further provides in its thirteenth section, that every officer, agent or employee of any common carrier who procures, aids or abets any such common carrier in its failure to obey, observe and comply with any order of the Railroad Commission shall be punished as prescribed in Section 1039 of the Penal Code of 1895.

The defendant pleads (*a*) that the said penalties and penal provisions of the Act approved Aug. 22nd, 1907, are unconstitutional, null and void, in that they are excessive, and therefore con-
31 trary to Article 1, Section 1, Paragraph 9, of the Constitution of the State of Georgia, which provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted, nor shall any person be abused while being arrested, while under arrest, or in prison," and also contrary to the eighth amendment to the Constitution of the United States, which provides that "excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted.

(*b*) That the said penalties and penal provision of the Act approved August 22nd, 1907, are unconstitutional, null and void, and contrary to Article 1, Section 1, Paragraph 3 of the Constitution of the State of Georgia, which provides that no person shall be deprived of liberty or property except by due process of law, and also contrary to the Fourteenth Amendment of the Constitution of the United States, which provides "Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law," the said provision being both a denial of due process of law, and a denial of the equal protection of the law, in that the necessary
32 effect and result of such legislation is to preclude a resort to the courts for the purposes of testing the powers of the Commission under the act, and results in a practical denial of a judicial hearing and allows the defendant to come into court and make its defence, subject to the condition that upon failure to make good its defence, the penalty for such a failure appropriates all of its property, or subjects it to extravagant and unreasonable loss, and the penalty provisions of the Acts are unconstitutional because the act so burdens any challenge of the powers of the Commission in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed.

11. The defendant further pleads that if the Commission has the power, under any law in the State of Georgia, to require the defendant to advance the charges of the Macon, Dublin and Savannah Railroad Company on freight, the delegation of such power to the Commission is unconstitutional, null and void, and contrary to the Fourteenth Amendment to the Constitution of the United States, and is a taking of the property of the defendant without due process of law, and a denial of the equal protection of the law, in that the defendant would be forced to give credit to the Macon, Dublin and Savannah Railroad Company, and to pay out its money for the

benefit of the Macon, Dublin and Savannah Railroad Company, and it would destroy its liberty of contract.

33 And now comes the Wadley Southern Railway Co. and answering the second count of the petition says:

1. It admits the allegations of the first paragraph of the petition, except that the principal office of the company is in the town of Wadley, Georgia. The principal office of the Wadley Southern Railway Company is in the City of Savannah, Georgia.

2. The defendant admits the allegations of the second paragraph of the petition.

3. The defendant admits the allegations of the third paragraph of the petition.

4. The defendant admits the allegations of the fourth paragraph of the petition, and in this connection alleges that the Wadley Southern Railroad Company and the Central of Georgia Railway Company compete via the route through Wadley, Georgia, with the Macon, Dublin and Savannah Railroad Company via the route through Rockledge, and with the Seaboard Air-Line Railway via the route through Collins, Georgia.

5. The defendant admits the allegations of the fifth paragraph of the petition, except that certain shares registered in the names of Directors are not owned by the Central of Georgia Railway Company.

34 6. The defendant admits the allegations of the sixth paragraph of the petition.

7. The defendant admits the allegations of the seventh paragraph of the petition.

8. The defendant admits the allegations of the eighth paragraph of the petition.

9. The defendant denies that there is any custom which regulates the matter of receiving freight from connections without the prepayment of freight charge.

This matter is and always has been a matter of voluntary contract between the connecting lines. Freight is received by some railroads from their connections without the prepayment of freight, but the practice is by no means universal, and depends entirely upon the interests of the connecting lines, and upon their voluntary contracts.

Defendant denies further, that it is usual and customary for initial carriers not to require the prepayment of freight before the delivery of goods to the delivering carrier, and alleges that this is a matter which each carrier regulates for itself, there being no obligation of any kind upon a common carrier to receive freight without the prepayment of freight charges.

The defendant further denies that there is any custom for the delivering carrier to collect all freight charges for the whole

35 service at the point of destination, and, on the contrary, alleges that there is no obligation on the part of the carriers to collect their freight at the destination from the consignee, and that, when a carrier does so, it does not by virtue of any custom which

controls it, or by virtue of any law which requires it, but its action in this behalf is entirely voluntary.

10. The defendant denies the allegations of the tenth paragraph of the petition.

11. The defendant denies that it has violated the Act approved February 28th, 1874, which is referred to in the 11th paragraph of the petition, and further alleges that, even if it had violated the said Act, the Railroad Commission of Georgia has no power to enforce any of the provisions of the Act, the remedy for the violations of the provisions of the said Act being an action at law by the shipper or the consignee, and the defendant further denies that by the violation of the Act of February 28th, 1874, if said Act was violated, it has become, and is indebted to the State of Georgia in the sum of $5,000, or in any other sum. The defendant further denies that any action has accrued to the State of Georgia under the Act approve-
36 August 22, 1907, and referred to in the eleventh paragraph of the petition.

And for further answer to the second count of the petition the defendant says:

8. The defendant has the right to refuse to advance and pay to the Macon, Dublin and Savannah Railroad Company the freight charges which have accrued on its line on shipments up to Rockledge, when such shipments are destined to Adrian. There is no law which requires the defendant to pay out its money to the Macon, Dublin and Savannah Railroad Company for freight charges earned by that railroad, and to recoup itself out of the shipper or consignee.

The defendant has the right to refuse to give credit to the Macon, Dublin and Savannah Railroad Company. The matter of the advance of freight charges by one carrier to another is a matter of contract, and whenever it is done it is the voluntary action of the carrier. To compel the Wadley Southern Railway Company to advance the charges of the Macon, Dublin and Savannah Railroad Company is equivalent to imposing upon it a contract it does not desire to make, and is further equivalent to establishing a through route and joint arrangement between the Wadley Southern Railway Company and the Macon, Dublin and Savannah Railroad Company on freight destined to Adrian via Rockledge.

The defendant declined to advance the freight charges of the Macon, Dublin and Savannah Railroad Company in the first instance because of the great number of shipments which were
37 overcharged by the Macon, Dublin and Savannah Railroad Company, which required the defendant to collect the overcharges from the consignees at destination, entailing considerable trouble and expense.

The defendant has a right to prefer its connection with the Central of Georgia Railway Company via Wadley, and such a preference is not an unlawful discrimination against the Macon, Dublin and Savannah Railroad Company, or against the shippers or patrons of the route via Rockledge. It is to the manifest interest of the Wadley Southern Railway Company that freight should move to Adrian through Wadley rather than through Rockledge, because when it

moves through Wadley, the defendant has a haul over its railroad of twenty-seven miles, while if it moves through Rockledge the defendant has a haul of only ten miles. It is therefore to the obvious interest of the defendant that freight should move via Wadley to Adrian. In addition its arrangements and connections with the Central of Georgia Railway Company at Wadley are satisfactory, and its connections with the Macon, Dublin and Savannah Railroad Company at Rockledge are unsatisfactory. Shippers to Adrian have a satisfactory through route via the Central of Georgia Railway Company and Wadley, and it is not unlawful discrimination on the part of the defendant to arrange its contracts with its
38 connections so that freight will move by preference through Wadley rather than through Rockledge.

9. The order of the Railroad Commission is not confined to business which originates and ends within the State of Georgia. It covers both interstate and intrastate business. The defendant therefore pleads that the order of the Commission is contrary to Article 1, Section 8, Paragraph 3 of the Constitution of the United States, which provides that "the Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and the said order of the Railroad Commission is unconstitutional null and void, in that it is an attempt on the part of the Railroad Commission of Georgia to interfere with and regulate commerce among the several States, contrary to the provisions of the Constitution of the United States above quoted.

10. Under the Act of the State of Georgia, approved Aug. 22nd, 1907, which is the Act under which the State of Georgia asserts the right to institute this penalty suit, it is provided that any common carrier "which fails, omits or neglects to obey, observe and comply, with any order of, or direction of or requirement of the Commission heretofore or hereafter passed, shall forfeit to the State of Georgia a sum not more than $5,000.00 for each and every offense, the amount to be fixed by the presiding judge. Every violation of the provision of this Act, or of any preceding Act, or of any
39 such order, direction or requirement of the Railroad Commission shall be a separate and distinct offense, and in case of continued violation, every day a violation thereof takes place shall be deemed a separate and distinct offense.

Said act further provides in its thirteenth section, that every officer, agent or employee of any common carrier who procures, aids or abets any such common carrier in its failure to obey, observe and comply with any order of the Railroad Commission shall be punished as prescribed in Section 1039 of the Penal Code of 1895.

The defendant pleads (*a*) that such penalties and penal provisions of the act approved Aug. 22nd, 1907, are unconstitutional, null and void, in that they are excessive, and therefore contrary to Art. 1, Sect. 1, Par. 9, of the Constitution of the State of Georgia, which provides that "excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted, nor shall any person be abused while being arrested, while under arrest, or in prison," and also contrary to the 8th amendment to the Constitution

of the United States, which provides that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment be inflicted.

(*b*) That the said penalties and penal provisions of the act approved Aug. 22nd, 1907, are unconstitutional, null and void, and contrary to Art. 1, Sect. 1, Par. 3, of the Constitution of
40 the State of Georgia, which provides that no person shall be deprived of life, liberty or property except by due process of law, and also contrary to the 14th Amendment of the Constitution of the United States, which provides "nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law," the said provisions being both a denial of due process of the law and a denial of equal protection of law, in that the necessary effect and result of such legislation is to preclude a resort to the courts for the purpose of testing the powers of the Commission under the act, and results in a practical denial of a judicial hearing, and allows the defendant to come into court and make its defense, subject to the condition that upon failure to make good its defense, the penalty for such failure appropriates all of its property, or subjects it to extravagant and unreasonable loss, and the penalty provisions of the act are unconstitutional because the act so burdens any challenge of the powers of the commission in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties involved.

11. The defendant further pleads that if the Commission has the power, under any law of the State of Georgia, to require the defendant to advance the charges of the Macon, Dublin and
41 Savannah Railroad Company, the delegation of such power to the Commission is unconstitutional, null and void, and contrary to the 14th Amendment to the Constitution of the United States, and is a taking of the property of the defendant without due process of law, and a denial of the equal protection of the law, in that the defendant would be forced to give credit to the Macon, Dublin and Savannah Railroad Company and to pay out its money for the benefit of the Macon, Dublin and Savannah Railroad Company, and it would destroy its liberty of contract.

And having fully answered, the defendant prays to be hence dismissed.

LAWTON & CUNNINGHAM,
R. L. GAMBLE,
Att'ys for the Defendant.

Filed in office November 11th, 1910.

W. S. MURPHY,
Clerk S. C. Jefferson County, Georgia.

42 Superior Court of Jefferson County, Georgia, November Term, 1910.

STATE OF GEORGIA
v.
WADLEY SOUTHERN RAILWAY COMPANY.

Penalty Suit.

And now comes the defendant, Wadley Southern *Southern* Railway Company, and amends its answer heretofore filed in this case, by alleging as to both of the counts of petition, as follows:

12. There is no right of action in the State of Georgia for the recovery, by suit or otherwise, of a penalty for any alleged violation of the Act of Feb. 28th, 1874, referred to in the petition. If such alleged right of action be based upon the provisions of the Act of August 22, 1907, "To increase the membership of the Railroad Commission of Georgia, etc.," referred to in paragraph 11 of the second count of the petition, then the provision in the said Act which undertakes and purports to give the right of action is unconstitutional, null and void.

(*a*) Because it is in conflict with Par. 8, Sect. 7, Art. 3 of the Constitution of the State of Georgia (Code Section 5771) which provides that "No law or ordinance shall pass which refers to more than one subject matter, or contains matter different from what is expressed in the title thereof." The said alleged act of the legislature does refer to more than one subject matter and contains matter different from what is expressed in the title of said act, particularly

43 in so far as it undertakes to give to the State a right of action for a violation of "any provision of this act or of the acts heretofore passed," whereas its title refers only to penalties for the violation of orders of the Commission and not to penalties for violation of any statutes theretofore passed.

13. The statutes of the State of Georgia so far as they undertake to give binding force to the rules, regulations, findings and orders of the Railroad Commission of Georgia are unconstitutional, null and void for the following reasons: They undertake to confer on the Railroad Commission the power to make findings of fact and to promulgate rules, orders and decisions which seriously and materially affect the personal and property interests and rights of individuals and corporations concerned. Not only is there no provision for any appeal from or review of any of these findings, orders or regulations, but there is not even a provision which gives to the persons or corporations against whom they may be directed the right to be heard, the right to present evidence and argument upon the facts and the law in order that a just and proper decision may be arrived at. Every finding, order, rule and regulation of the Commission can and may be made (and in practice many of them are made) without any hearing from interested parties. For these reasons the findings, orders, rules and regulations of the Commission are without

binding force, and are null and void, in that they are in con-
44 flict with (*a*) Paragraph 3 of Section 1 of Article 1 of the Constitution of the State of Georgia, which provides "No person shall be deprived of life, liberty or property except by due process of law," and (*b*) the 14th Amendment to the Constitution of the United States, which provides "Nor shall any State deprive any person of life, liberty or property without due process of law, nor shall it deny any person within its jurisdiction the equal protection of the law," (*c*) Paragraph 2 of Section 1 of Article 1 of the Constitution of the State of Georgia, which provides, "Protection to person and property is the paramount duty of government and shall be impartial and complete," and (*d*) Par. 2, Sect. 4, Art. 1 of the Constitution of State of Georgia which provides "Legal acts in violation of this Constitution and of the Constitution of the United States are void, and the judiciary shall so declare them."

LAWTON & CUNNINGHAM,
R. L. GAMBLE,
Attorneys for Defendant.

B. T. RAWLINGS, *J. S. C. M. C.*

Filed in office November 16, 1910.
W. S. MURPHY,
Clerk S. C. Jefferson County, Georgia.

45 3. *The Bill of Exceptions "Pendente Lite" with the Certificate Attached Thereto.*

Superior Court, Jefferson County, Georgia, November Term, 1910.

STATE OF GEORGIA
v.
WADLEY SOUTHERN RAILWAY COMPANY.

Suit for Penalty.

Be it remembered that the above stated cause came on for trial on November 16, 1910, at the November Term, 1910, before the Hon. B. T. Rawlings, Judge of said court.

At the conclusion of the evidence submitted on behalf of the State of Georgia, and when the State of Georgia had announced its case as closed, the defendant moved the court for a nonsuit, on the ground that under the pleadings and the law the State had failed to make out such a case as entitled it to have the question submitted to the jury; that there was no proof that the defendant had violated any order of the Commission; that there was no proof that defendant had in any way violated the law; that it did not appear that the action had been brought in the name of the State of Georgia by any proper authority; that the order of the Commission did not require that defendant should advance to the Macon, Dublin and Savannah Railroad Company, or be responsible to it for

charges accruing on shipments up to Rockledge; that the
46 order of the Railroad Commission was null and void for want of jurisdiction, that the attempt to confer jurisdiction upon it was unconstitutional; and that the act purporting to subject the defendant to penalties for failure to comply with the said order was null and void, all because of conflict with the Constitution of Georgia and the Constitution of the United States, as set out in the answer of the defendant as amended, and that nonsuit should be granted because the State had failed to make out its case.

After argument heard the court overruled the motion for a nonsuit and denied the same, whereupon the defendant introduced testimony and the court delivered its charge, the jury found its verdict pronouncing defendant guilty, and the court assessed and entered judgment for penalty against the defendant and for the State of Georgia in the sum of One Thousand ($1,000.00) Dollars.

Be it further remembered that during the trial of said cause O. L. Anderson, a witness for the State, was on the stand and had testified that patrons and shippers of the Macon, Dublin and Savannah Railroad could not ship their freight via that line and then to the point of destination on the Wadley Southern unless freight was prepaid. He was asked by Counsel for the State:

Q. What effect has that had upon the patronage of the Macon, Dublin and Savannah Railroad?"

Defendant's counsel objected to the question on the ground that there was no allegation in the petition as to the effect on
47 the patronage, that the issue was a naked question of fact as to whether or not the defendant had disobeyed the order, and that the question was irrelevant and immaterial.

The court overruled the objection and allowed the witness to testify as follows:

A. "It has had a pretty bad effect. Adrian has been a dull point for us. We used to have a pretty good patronage there before; and they continued to keep that up until the Railroad Commission passed up this order ordering the Wadley Southern to move that freight properly, and after they passed that order, they still refused to take it, and my patrons at Adrian tell me that they would like to have their freight shipped over the M. D. and S., but they could not afford to have it shipped that way over the M. D. & S. and have it held up there and have to prepay the freight before they could get it, or get on the train and pay railroad fare to Rockledge and back, besides paying the freight, and for that reason they could not patronize our line under those circumstances."

Be it further remembered that during the trial of said cause H. A. Jordan, a witness for the defendant, testified that he was familiar with all the facts in connection with the controversy out of which the case arose, and that the instructions which were the cause of complaint were issued by him. He was asked by counsel for defendant:

Q. "In connection with shipments over the Macon, Dublin
48 and Savannah via Rockledge to Adrian, did you have any trouble with reference to overcharges?"

Counsel for the State objected to this question on the ground that

the evidence is irrelevant to this case and does not make a defense to this action.

Defendant offered the evidence to show that the alleged discrimination against the Macon, Dublin and Savannah Railroad Company, if one, was a just discrimination, and, being a just discrimination, neither the Railroad Commission, nor any one else has power to prevent it; that the Commission has only the right to make just and reasonable orders, just and reasonable provisions, and the testimony was offered for the purpose of showing that their order was not just and not reasonable. The evidence was offered to prove that trouble with overcharges made by the Macon, Dublin and Savannah Railroad had been so great as to justify a change.

The court sustained the objection and ruled out the testimony.

The Superior Court of Jefferson County adjourned for the term within less that thirty days after the date on which the
49 foregoing occurred, that is to say it adjourned on the — day of November, 1910.

And now, within 60 days after the rulings complained of, all of which were made on November 16th, 1910, comes the Wadley Southern Railroad Company, and excepts to the order of said court overruling and refusing defendant's motion for nonsuit, to the refusal of the court to grant a nonsuit on defendant's motion, to the refusal of the court to sustain the objection to the testimony of O. L. Anderson above set out, and to the sustaining by the court of the State's objection to the testimony of H. A. Jordan above set out, and the refusal to permit the defendant to introduce said testimony, and to prove said facts; and assigns each of said orders, rulings and refusals as error; and prays that the facts herein stated may be certified to be true and made a part of the record, and ordered to be placed on the record, and that this, its bill of exceptions pendente lite may be certified and made part of the record of the case, in order that the errors herein alleged may, at the proper time, be considered and corrected.

LAWTON & CUNNINGHAM,
R. L. GAMBLE,
Att'ys for Wadley Southern Railway Company.

I do certify that the foregoing bill of exceptions pendente
50 lite is true. It is ordered that it be made a part of the record in the cause.

B. T. RAWLINGS,
Judge Superior Court, Jefferson County, Georgia.

January 6th, 1911.

Filed in office January 10th, 1911.

W. S. MURPHY, *Clerk.*

4. *Defendant's Motion for New Trial and the Amendment Thereto.*

STATE OF GEORGIA
v.
THE WADLEY SOUTHERN RAILWAY COMPANY.

Verdict and Judgment for Plaintiff at November Term, 1910, of Jefferson Superior Court, on 17th Day of November, 1910.

The defendant being dissatisfied with the verdict and judgment in said case, comes during said term of the court, before the adjournment thereof, and within 30 days from said trial, and moves the court for a new trial, upon the following grounds, towit:

1st. Because the verdict is contrary to evidence and without evidence to support it.

2nd. Because the verdict is decidedly and strongly against
51 the weight of evidence.

3d. Because the verdict is contrary to law and the principles of justice and equity.

Whereupon he prays that these, his grounds for a new trial, be inquired of by the court, and that a new trial be granted him.

LAWTON & CUNNINGHAM,
R. L. GAMBLE,
Attorneys for Movant.

Read and considered. It is ordered that the State of Georgia show cause before me at Sandersville, at 2:30 o'clock on the 21st day of January, 1911, why the foregoing motion should not be granted. It is further ordered that the plaintiff be served with a copy of this motion and order; and that this order act as a supersedeas until the further order of the court. This 17th day of November, 1910.

B. T. RAWLINGS,
Judge S. C. M. C.

Filed in office this 17th day of November, 1910.
W. S. MURPHY, *Clerk.*

52 November Term, 1910, of Jefferson Superior Court.

STATE OF GEORGIA
v.
THE WADLEY SOUTHERN RAILWAY COMPANY.

Verdict and Judgment for Plaintiff.

The defendant having made a motion for a new trial in said case, on the grounds therein stated, and said grounds having been approved by the court, and it appearing that it is impossible to make out and complete a brief of the testimony in said case before

adjournment of court. It is ordered by the court that said motion be heard and determined on the 21st day of January, 1911, in vacation, at Sandersville, at 2:30 p. m., and that movant may amend said motion at any time before the final hearing.

If for any reason said motion is not heard and determined at the time and place above fixed it is ordered that the same shall be heard and determined at such a time and place in vacation as counsel may agree upon, and upon failure to agree, then at such time and place as the presiding — may fix on the application of either party, of which time and place the opposite party shall have at least five days' notice.

If for any reason this motion is not heard and determined before the beginning of the next term of this court then the same shall stand on the docket until heard and determined at said term
53 or thereafter.

It is further ordered that the movant have until this hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or in vacation, and if the hearing of the motion shall be in vacation and the brief of evidence has not been filed in the clerk's office before the date of the hearing said brief of evidence may be filed in the clerk's office at any time within ten days after the motion is heard and determined.

This 17th day of November, 1910.

B. T. RAWLINGS,
Judge S. C. M. C.

Filed in office November 17th, 1910.
W. S. MURPHY, *Clerk.*

Due and legal service of the within motion and order acknowledged, time, copy and all other and further service waived.
This 17th day of November, 1910.

JAS. K. HINES,
Attorney for Plaintiff.

54 *Motion for New Trial by Defendant.*

Superior Court of Jefferson County, Georgia, November Term, 1910.

STATE OF GEORGIA
v.
THE WADLEY SOUTHERN RAILWAY CO.

Amendment to Motion for New Trial.

Under leave granted by order of court on Nov. 17, 1910, passed during the November Term of the court, on the day on which the verdict and judgment were rendered against the defendant, comes the defendant, Wadley Southern Railway Company, and amends

its motion for new trial filed Nov. 17th, 1910, by adding to the three grounds thereof the following additional grounds:—

4th. Because the verdict is contrary to the charge of the court in this:

The court charged the jury as follows:

"I charge you that if you find that after the 12th day of March, 1910, this Wadley Southern Railway Company has exacted prepayment of freights for shipments going over the Macon, Dublin and Savannah Railroad Company destined for points on the line of the Wadley Southern Railway Company, and you find that shipments have been made destined for points along the line of the Wadley Southern Railway Company over the Central of Georgia Railway Company, and that a like line of dealing was not
55 adopted or required at Wadley for freights shipped by the Central of Georgia Railway Company destined for points along the line of the Wadley Southern Railway Company, that is, that branch of it running from Wadley to Rockledge, and you believe and find that there has been discrimination in favor of the shipments by the Central for the Wadley Southern and against shipments transported over the Macon, Dublin and Savannah Railroad Company at Rockledge, and you believe such to have been established by the preponderance of the testimony in this case, then you will be authorized, and it will be your duty to find in favor of the petition-, that is, find the defendant guilty."

Not only did the weight of evidence fail to show that the defendant had exacted prepayment of freights for the shipments described, but on the contrary the weight of the evidence, and all of the evidence, distinctly showed that the defendant had not exacted such prepayment of freights, either from point of origin to Rockledge or from Rockledge to points along the defendant's line. The only proof of the exactment of prepayment of freight was proof to the effect that the Macon, Dublin and Savannah Railway Company had for its own protection exacted from shippers the prepayment of freights.

56 5th. Because the verdict of the jury is contrary to the charge of the court in this:

The court charged the jury as follows:

"On the other hand, if you find from the facts and circumstances of the case that there has been no discrimination in favor of shipments transported via the Central of Georgia R'y Co., and that there has been no discrimination against shipments transported over the Macon, Dublin and Savannah R'y Co., by the requirement of prepayment of freights at Rockledge, then you will be authorized, and it would be your duty, to find the defendant not guilty."

Not only did the weight of the evidence fail to show that the defendant had required prepayment of freights at Rockledge, which necessarily means prepayment of freight over the lines of the defendant from Rockledge to destination, but the weight of evidence, and all the evidence distinctly shows that the defendant had not required prepayment of freights at Rockledge, or any prepayment.

6th. Because the verdict of the jury is contrary to the charge of the court in this:

The court charged the jury as follows:

"If you find and determine from such facts and circumstances that there has been, on the part of the Wadley Southern R'y Co.
57 an exaction of the prepayment of freights at Rockledge on shipments delivered or tendered to the Wadley Southern R'y Co. by the Macon, Dublin and Savannah Railroad Co., destined for points on the Wadley Southern, and that no such exaction of payments of freight charges was made on shipments of freight transported over the Central of Georgia Ry. Co., and delivered at Wadley for the Wadley Southern R'y Co., then it will be your duty to find the defendant guilty."

Not only did the weight of the evidence fail to show that there had been an exaction of the prepayment of freights at Rockledge on any shipments (which necessarily means the prepayment of freights over the line of the defendant from Rockledge to destination) but on the contrary, the weight of evidence, and all of the evidence showed that there had been no exaction of the prepayment of freights at Rockledge on any shipments.

7th. Because the verdict of the jury was contrary to the charge of the court in this:

"If you believe and find that there was no discrimination exercised at Rockledge, by exacting the prepayment of freights, then you would be authorized to find the defendant not guilty."

Not only did the weight of evidence show that there had been no discrimination exercised at Rockledge by exacting prepay-
58 ment of freights (the exercise at Rockledge of such prepayment being necessarily confined to freights over the line of the defendant from Rockledge to destination), but on the contrary, the weight of the evidence, and all of the evidence, distinctly showed that there was no such exaction of the prepayment of freights at any point, and therefore no discrimination.

8th. The court erred in his charge to the jury in this: He undertook to state to the jury the contentions of the parties. In stating the contentions of the defendant, he confined himself to the following:

"The defendant corporation, the Wadley Southern Ry. Co., on the other hand, contends that it is not liable under this petition; that they have not violated any rule of the Railroad Commission; they contend that there has been no proof to show that there has been any discrimination; that while a suit has been maintained there is no proof introduced to show that there has been any discrimination; it contends that it is not liable and should not pay any penalty under this proceeding. Now these are substantially the contentions of the plaintiff and the defendant in this case."

It appears from the pleadings, from the examination of witnesses by the defendant's counsel, and from arguments made by the defendant, that the defendant also presented in its defense the following contention and points, which were omitted from the court's
59 statement, thereby depriving the defendant of the benefit of the contentions herein set out, towit:

1. The defendant admitted that it declined to advance to Macon, Dublin and Savannah Railroad Company freight charges earned by that company on shipments destined to Adrian and turned over by that company to the defendant at Rockledge for transportation from Rockledge to Adrian, and admitted that it did advance similar charges of Central of Georgia Ry. Co. at Wadley. It contended that this was not a violation of the act of 1874, nor of the order of the Railroad Commission. See paragraphs 3 and 4 of defendant's answer to the first count.

2. The defendant denied that the Railroad Commission was empowered by law to pass the order which was the basis of the suit. See paragraph 5 of defendant's answer to the first count.

3. The defendant contended that it had never demanded that its charges from Rockledge to destination should be prepayed or that the charges of the Macon, Dublin and Savannah Railroad Co. should be prepaid, and contended that the only thing which it had refused to do was to advance to the Macon, Dublin and Savannah Railroad Company the charges earned by it up to Rockledge. See paragraph 6 of defendant's answer to the first count.

4. The defendant contended that it has the right to refuse to advance the charges of the Macon, Dublin and Savannah Rail-
60 road Company, to refuse to give credit to the M. D. & S. Ry. Co., to refuse to enter into a contract with that company for such advances; that it had good reason for this refusal; that it had a right to prefer one connection over another, and that this was not an unlawful discrimination. See paragraph 8 of the defendant's answer to the first and second counts respectively.

5. The defendant contended that the order of the Commission not being confined to business wholly within the State of Georgia was contrary to Art. 1, Sect. 8, Par. 3 of the Constitution of the United States, giving to Congress the exclusive power to regulate commerce among the several States. See Par. 9 of Defendant's answer to the first and second counts respectively.

6. The defendant contended that that portion of the Act of the General Assembly of Georgia, approved August 22, 1907, which authorized the institution of this suit and the collection of penalties was unconstitutional, null and void for the reasons set out in paragraph 10 of defendant's answers to the first and second counts respectively.

7. The defendant contended that any attempt to delegate to the Railroad Commission the power to require that the defendant should advance the charges of the Macon, Dublin and Savannah Railroad Company was unconstitutional, null and void, for the reasons set out
in paragraph 11 of defendants' answer to the first and second
61 counts respectively.

8. The defendant denied that there was any custom regulating the matter of receiving freight from connections without the prepayment of charges and the matter of the collection by the delivering carrier of freight charges of the initial carrier. See paragraph 9 of defendant's answer to the second count.

9. The defendant contended that it had not violated the act approve- Feb. 28, 1874, and that the Railroad Commission had no power to enforce said act, the remedy being by an action of law in favor of the aggreived shipper. See par. 11 of defendant's answer to the second count.

10. The defendant contended that there was no right of action for the penalty claimed, and if such right was based on the Act of August 27th, 1907, such pretended grant of power was unconstitutional, null and void, because the act was in conflict with Par. 8, Sect. 7 of Art. 3 of the Constitution of Georgia, Code Section 5771, which provides that "No law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof." See par. 12 of defendant's answer to both counts contained in defendant's amendment filed Nov. 16, 1910.

11. The defendant claimed that the attempt to give bind-
62 ing force to the rules, regulations, findings and orders of the Railroad Commission on which the complaint was founded was unconstitutional, null and void: because in conflict with (*a*) Par. 3 of Sect. 1 of Art. 1 of the Constitution of Georgia, which provides, "No person shall be deprived of life, liberty or property except by due process of law;" (*b*) the 14th amendment of the Constitution of the United States, which provides, "Nor shall any State deprive any person of life, liberty or property without due process of law, nor shall it deny any person within its jurisdiction equal protection of the law;" (*c*) Paragraph 2 of Section 1 of Article 1 of the Constitution of the State of Georgia, which provides, "protection to person and property is the paramount duty of government, and should be impartial and complete;" and (*d*) Paragraph 2 of Section 4 of Article 1 of the Constitution of Georgia, which provides, "Legislative acts in violation of this Constitution, or the Constitution of the United States are void and the judiciary shall se declare them." See paragraph 13 of defendant's answer to both counts by amendment filed November 16, 1910.

12. Defendant contended that the second count of the petition could not be maintained because brought without lawful authority for the use of the name of the State of Georgia as petitioner therein, because as appears from the Governor's order of April 18, 1910,
attached to the petition as Exhibit A, the only authority for
63 the action is authority to institute a suit in the name of the State of Georgia for recovery of a penalty for refusal to obey the order of the Commission, whereas the second count is for recovery of a penalty for refusal to obey a statute.

Ninth. Because the court erred in failing to charge the jury on the issues of the case as made by the pleadings and the arguments, particularly on the following issues and contentions presented by the defendant, none of which were covered by the charge of the court, towit:

1. The defendant admitted that it declined to advance to the Macon, Dublin and Savannah Railroad Company freight charges earned by that company on shipments destined to Adrian and

turned over by that company to the defendant at Rockledge for transportation from Rockledge to Adrian, and admitted that it did advance similar charges of the Central of Georgia Railway Company at Wadley. It contended that this was not a violation of the act of 1874, nor of the order of the Railroad Commission. See paragraphs 3 and 4 of the defendant's answer to the first count.

2. The defendant denied that the Railroad Commission was empowered by law to pass the order which was the basis of the suit. See paragraph 5 of defendant's answer to the first count.

3. The defendant contended that it had never demanded
64 that its charges from Rockledge to destination should be prepaid, or that the charges of the Macon, Dublin and Savannah Railroad Company should be prepaid, and contended that the only thing which it had refused to do was to advance to the Macon, Dublin and Savannah Railroad Company the charges earned by it up to Rockledge. See paragraph 6 of the defendant's answer to the first count.

4. The defendant contended that it has the right to refuse to advance the charges of the Macon, Dublin and Savannah Railroad Company, to refuse to give credit to the Macon, Dublin and Savannah Railroad Company, to refuse to enter into a contract with that Company for such advances; that it had good reasons for this refusal; that it had a right to prefer one connection over another, and that this was not an unlawful discrimination. See paragraph 8 of defendant's answers to the first and second counts respectively.

5. The defendant contended that the order of the Commission not being confined to business wholly within the State of Georgia was contrary to Art. 1, Sect. 8, Par. 3 of the Constitution of the United States, giving to Congress the exclusive power to regulate commerce among the several States. See Par. 9 of the defendant's answers to the first and second counts respectively.

6. The defendant contended that portion of the act of the General Assembly of Georgia, approved August 22, 1907, which authorized the institution of this suit and the collection of penalties
65 was unconstitutional, null and void, for the reasons set out in paragraph 10 of the defendant's answer to the first and second counts respectively.

7. The defendant contended that any attempt to delegate to the Railroad Commission the power to require that the defendant should advance the charges of the Macon, Dublin and Savannah Railroad Company was unconstitutional, null and void for the reasons set out in Par. 11 of defendant's answers to the first and second counts respectively.

8. The defendant denied that there was any custom regulating the matter of receiving freight from connections without the prepayment of charges and the matter of the collection by the delivering carrier of freight charges of the initial carrier. See paragraph 9 of the defendant's answer to the second count.

9. The defendant contended that it had not violated the Act approved Feb. 28, 1874, and that the Railroad Commission had no power to enforce said act, the remedy being by an action at law

in favor of the aggreived shipper. See paragraph 11 of defendant's answer to the second count.

10. The defendant contended that there was no right of action for the penalty claimed, and if such right was based on the Act of August 27, 1907, such pretended grant of power was uncon-
66 stitutional, null and void, because the act was in conflict with Par. 8, Sect. 7, Art. 3 of the Constitution of Georgia, Code §5771, which provides that "No law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof." See Par. 12 of defendant's answer to both counts contained in the defendant's amendment filed Nov. 16, 1910.

11. The defendant claimed that the attempt to give binding force to the rules, regulations, findings and orderw of the Railroad Commission on which the complaint was founded was unconstitutional, null and void, because in conflict with: (*a*) Par. 3 of Sect. 1 of Art. 1 of the Constitution of Georgia, which provides, "No person shall be deprived of life, liberty or property except by due process of law;" (*b*) the 14th amendment to the Constitution of the United States which provides, "Nor shall any State deprive any person of life, liberty or property without due process of law, nor shall it deny any person within its jurisdiction equal protection of law;" (*c*) Par. 2 of Sect. 1 of Art. 1 of the Constitution of the State of Georgia, which provides, "Protection to person and property is the paramount duty of government, and should be impartial and complete;" and (*d*) Par. 2 of Sect. 4 of Art. 1 of the Constitution of Georgia, which provides, "Legislative acts in violation of this Constitution, or the Constitution of the United States are
67 void, and the judiciary shall so declare them." See par. 13 of defendant's answer to both counts by amendment filed Nov. 16, 1910.

12. Defendant contended that the second count of the petition could not be maintained because brought without lawful authority for the use of the name of the State of Georgia as petitioner therein, because, as appears from the Governor's order of April 18, 1910, attached to the petition as Exhibit A, the only authority for the action is authority to institute a suit in the name of the State of Georgia for recovery of a penalty for refusal to obey the order of the Commission, whereas the second count is for the recovery of a penalty for refusal to obey a statute.

Tenth. Because the court erred in failing to construe the order of the Railroad Commission which was the basis of the suit and to instruct the jury as to the proper construction thereof. Counsel for the State contended that the order of the Commission was properly construed as prohibiting defendant from refusing to be responsible to or to collect for or to advance to the Macon, Dublin and Savannah Railroad Company freight charges from point of destination to Rockledge on shipments tendered by the Macon, Dublin and Savannah to defendant at Rockledge, and destined to points on the line of the defendant. Defendant contended that the order of the Commission was not properly construed as prohibiting such a refusal,

but on the contrary only prohibited the defendant from requiring shippers to prepay the charges of the Macon, Dublin and
68 Savannah Railroad from point of origin to Rockledge. It was the duty of the court to settle this conflict in the issues and to instruct the jury as to the proper construction of the order, and this the court failed to do, but left to the jury the construction of the order.

14. Because the court erred in charging the jury as follows: "I charge you that if you find that after the 12th day of March, 1910, the Wadley Southern Ry. Co. has exacted prepayment of freights for shipments going over the Macon, Dublin and Savannah Railway Co., destined to points along the Wadley Southern Ry. Co., and you find that shipments have been made destined for points along the line of the Wadley Southern Ry. Co., over the Central of Georgia Ry. Co., and that a like line of dealing was not adopted or required at Wadley for freights shipped by the Central of Georgia Ry. Co., destined for points along the Wadley Southern Ry. Co., that is, that branch of it running from Wadley to Rockledge, and you believe and find that there has been discrimination in favor of the shipments by the Central for the Wadley Southern and against shipments transported over the Macon, Dublin and Savannah Railroad Co. at Rockledge, and you believe such to have been established by the preponderance of the testimony in this case, then you will be authorized and it will be your duty to find in favor of the petition, that is, find the defendant guilty.
69 "On the other hand if you find from the facts and circumstances of the case that there has been no discrimination in favor of shipments transported by the Central of Georgia Ry. Co., and that there has been no discrimination against shipments transported over the Macon, Dublin and Savannah Ry. Co. by the requirement of the prepayment of freights at Rockledge, then you will be authorized and it will be your duty to find the defendant not guilty."

The error in said charge is:

(1) That it overrules and rejects all defenses of the defendant, and particularly those which attack the constitutionality of the statute under which the right of action was claimed.

(2) That it in effect instructed the jury that all discriminations in favor of one connecting line as against another were unlawful, whereas the only discriminations which are unlawful are those which are unjust and unreasonable.

(3) It submitted to the jury the issues under the second count of the declaration, which being an action for a penalty for a violation of the statute, is not authorized by order of the Governor attached to the petition as Exhibit A, and therefore was not properly before the court.

(4) It submits to the jury questions not covered by the order of the Commission, for the violation of which the action was brought. The order of the Commission prohibited only requirement
70 by the defendant that shippers should actually prepay charges from point of origin to destination, whereas the charge of the court in its instructions to the jury is that it was a violation of the

order to exact prepayment of charges from Wadley and Rockledge to local stations on the defendant's line.

(5) It is not unlawful for a railroad company to exact payment of freights from one station delivered to it by one connection and not to exact prepayment of freights from another station delivered to it by another connection.

(6) It is not unlawful for a railroad company to justly discriminate in favor of a preferred connection, particularly when it obtains corresponding benefits from the preferred connection and suffers corresponding disadvantages from the connection not preferred.

12. Because the court erred in charging the jury as follows: "If you find and determine from such facts and circumstances that there has been on the part of the Wadley Southern Ry. Co. an exaction of the prepayment of freights at Rockledge on shipments delivered or tendered to the Wadley Southern Ry. Co. by the Macon, Dublin and Savannah Ry. Co. destined for points on the Wadley Southern, and that no such exaction of payments of freight charges was made on shipments of freight transported over the Central of Georgia Ry. Co. and delivered at Wadley for the Wadley Southern Ry. Co., then it will be your duty to find the defendant guilty.

71 "If you believe and find that there has been no discrimination exercised at Rockledge by exacting prepayment of freights, then you will be authorized to find the defendant not guilty."

The error in this charge is:

(1) That it improperly overrules and rejects all defenses of the defendant, and particularly those which attack the constitutionality of the statute under which the right of action was claimed.

(2) That it in effect instructed the jury that all discriminations in favor of one connecting line as against another were unlawful, whereas the only discriminations which are unlawful are those which are unjust and unreasonable.

(3) It submitted to the jury the issues under the second count of the declaration, which being an action for a penalty for a violation of a statute, is not authorized by the order of the Governor, attached to the petition as Exhibit A, and therefore was not properly before the court.

(4) It submits to the jury questions not covered by the order of the Commission, for the violation of which the action was brought. The order of the Commission prohibited only requirements by the defendant that shippers should actually prepay charges from point of origin to destination, whereas the charge of the court in

72 its instruction to the jury is that it was a violation of this order to exact prepayment of charges from Wadley and Rockledge to local stations on defendant's line.

(5) It is not unlawful for a railroad company to exact prepayment of freights from one station delivered to it by one connection and not to exact prepayment of freights from another station delivered to it by another connection.

(6) It is not unlawful for a railroad company to justly discriminate in favor of a preferred connection, particularly when it obtains

corresponding benefits from the preferred connection, and suffers corresponding disadvantages from the connection not preferred.

Thirteenth. Because the court erred in refusing to grant defendant's motion for a nonsuit, which was made at the closing of the testimony on behalf of the petitioner, on the grounds set out in the bill of exceptions pendente lite.

Fourteenth. Because the court erred in failing to charge the jury that before they could find the defendant guilty they must be satisfied beyond a reasonable doubt of the facts necessary to constitute guilt, this being a suit for a penalty quasi criminal in its nature.

73 Fifteenth. Because the court erred in failing to properly submit to the jury the issues in the said cause.

Sixteenth. Because the court erred in failing to instruct the jury that the action could not be maintained because the statute which purported to subject the defendant to the prescribed penalties was unconstitutional, null and void, for the reasons set out in Par. 10 of the answer of the defendant to the first and second counts of the petition.

Seventeenth. Because the court erred in failing to instruct the jury that the action could not be maintained and they must find the defendant not guilty, because the statutes which purport to confer power and jurisdiction upon the Railroad Commission to pass the order referred to, and give the State the right to exact a penalty for refusal to obey the same, are unconstitutional, null and void for the reasons set out in paragraphs 11, 12 and 13 of the defendant's answers, as amended to the first and second counts of the petition.

Eighteenth. Because the court erred in failing to instruct the jury to find a verdict for the defendant.

LAWTON & CUNNINGHAM,
R. L. GAMBLE,
Att'ys for Defendant.

74 Grounds of the motion approved as correct in fact and ordered filed.

B. T. RAWLINGS,
Judge S. C., Jefferson County, Georgia.

January 21, 1911.

Filed in office January 24, 1911.
W. S. MURPHY, *Clerk.*

75 *5th. Brief of Evidence.*

Superior Court of Jefferson County, Georgia.

STATE OF GEORGIA
v.
WADLEY SOUTHERN RAILWAY CO.

Motion for New Trial by the Defendant.

Brief of Evidence.

Evidence-in-chief for the State.

The State introduced into evidence the following complaint from the records of the Railroad Commission:

ADRIAN, GA., *Aug.* 17*th*, 1909.

"To the Railroad Commission of Georgia, Atlanta, Ga.

GENTLEMEN: We, the undersigned merchants and business men of Adrian, Ga., respectfully ask your Honorable body to aid us in getting our freight transferred promptly from the Macon, Dublin and Savannah Railroad to the Wadley Southern at Rockledge, Ga. The Wadley Southern refuses to handle freights delivered them at Rockledge by M. D. and S. without freight charges being fully prepaid to Rockledge, and some of us have had freight lying in Rockledge several days, being unable to get it moved by Wadley Southern."

Yours most respectfully,

76

C. H. BARWICK.
ADRIAN HARDWARE CO.
ADRIAN SUPPLY CO.
HATCHERSON FURN. CO.
T. A. CHEATAM.
JAMES MERCANTILE CO.
JOHNSON AND SPELL.
H. W. RICKS.
G. W. DRAKE & CO.
C. A. FOUNTAIN."

Also the following letter from the Secretary of the Commission to the Wadley Southern Railway Company.

File 8957.

MARCH 12, 1910.

Mr. H. A. Jordan, G. F. A. Wadley Southern Railway Co., Swainsboro, Ga.

DEAR SIR: By direction of the Railroad Commission, I transmit to you herewith copy of order issued by the Commission at its meet-

ing on yesterday in the matter of complaints filed on account of the refusal of your company to accept freight from the Macon, Dublin and Savannah Railroad Company at Rockledge, Georgia, without the prepayment of freight charges. This order will explain itself.

Yours very truly,

CAMPBELL WALLACE, *Secretary.*

Also the following letter from general counsel of the Wadley Southern to the Secretary of the Railroad Commission, dated April 14th, 1910.

77 DEAR SIR: Your letter of the 31st ult. to Mr. H. A. Jordan, G. F. A. of the Wadley Southern Railway has been handed to me for reply.

We have advised the Wadley Southern Railway Company that in our opinion the order of the Railroad Commission is not legal, and that the Railroad Company is not legally bound to observe it. The Railroad Company is acting in pursuance of this advice and are declining to obey the order. We beg to say that the Wadley Southern Railway is not acting in this matter in a captious spirit, but simply with the purpose of preserving its rights which are being maintained under the advice of counsel.

If the Commission should see fit to further prosecute the matter, we will facilitate as much as we can a judicial decision of the question.

Yours very truly,

LAWTON & CUNNINGHAM,
General Counsel.

78 J. C. LITTLE testified for the State:

I am and have been president of the Louisville and Wadley Railroad for twenty two years, and was for seventeen or eighteen years also its general manager. I was not informed like I ought to be as to the movement of freights from connecting carriers in this State. I could not answer as to the payment of charges where freight came over two connecting lines. I am not acquainted with all the custom. That was left entirely to our freight man, and I did not inform myself on that, and was not capable of looking into those matters. I was also a merchant and received freight over the Louisville Railroad. It was nearly always paid by the consignee at Louisville, which was always the general custom. I could not answer as to shipments made to Louisville from points on the Central. We got freight in but we never shipped it out. We shipped cotton but the freight was paid at destination. I was a merchant for forty years.

From the time the Louisville and Wadley Railroad was built the freights moving to Louisville from points on the Central or other points was payable, I think, according to the general custom, at destination. I know nothing about the custom when freight was shipped over the old Stillmore Air-Line. I think there was some trouble with relation to those shipments, but I cannot say what the

custom was. If I ever received any thing I knew nothing of it.

79 I am unable to say about the custom as to freight shipped over the Louisville and Wadley and then over the Wadley and Mt. Vernon; I knew nothing about what was coming in; we had an agent and he looked after all that. While I was general manager my whole time was consumed in looking after the road-bed, etc., not after the freight business. I trusted our freight man in everything. I think the general custom about the payment of freight on incoming freight over the Louisville and Wadley from other connecting carriers was payment at this end,—at point of destination.

Cross-examination of J. C. LITTLE:

As far as I know that was freight that came over the Central. Those were all the dealings I had. During that time the Central was interested in the Louisville and Wadley, helped them in a great many ways, was very friendly to it, and they had the closest friendly relations during all that time, and the only case I know of is the case in which one road was largely interested in the other and they had the very closest relations. My knowledge does not give me any information as to any other cases. Furthermore, I will state that whenever we wanted information or anything of the kind we referred to the Central and they always gave it to us. Very often freight was prepaid to destination.

80 Redirect examination of J. C. LITTLE:

I know nothing about the freight business. It did not come under my jurisdiction. It was the general custom for me to receive my merchandise freight paid at destination.

H. HERTWIG testified for the State:

I have been in the railroad business about 23 years with the Central of Georgia, until about 7 years ago when I went with the Macon, Dublin and Savannah. I was with the Central about 16 years, and during the past 7 years with the Macon, Dublin and Savannah. I am familiar with the general custom of railways in this country about the collections of freight charges at the junctions between different lines. It has been the custom between all transportation lines that one tendering the other freight for points located on its line, where the shipment originated beyond that junction point, when they would tender them that freight with such accrued charges on up to that junction point, as had accrued on it, that line then accepting those charges, together with their proportion of freight, on to the destination. The delivering line the last line collected the freight when it moved over two or more connecting carriers. This has been the general custom ever since I have been connected with railroads.

During my connection with the Macon, Dublin and Savannah it had shipments of freight over its line destined to points on the old

Wadley and Mt. Vernon. In these cases it depended en-
81 tirely on the nature of the shipments. If they were for-
warded from points of origin collect, the shipment would be forwarded by way of Rockledge, re-billed at Rockledge, with such accrued charges as had accrued on it up to that point, together with the local charges up to destination, and the total charges collected at destination by the Wadley and Mt. Vernon. On the other hand, if the shipment was prepaid at point of origin it would be transported to Rockledge and a sufficient amount of money tendered to the Wadley and Mt. Vernon to prepay their proportion of the charges to destination. It was usual for freight to move either prepaid or collect, depending on the nature of the shipment. During this period shippers had the privilege of shipping collect or prepaid, as they felt disposed. Whenever a shipper desired to ship without prepayment of freight he had that right. This was the general custom, so far as my knowledge goes, with all transportation companies.

I was in the employ of the Macon, Dublin and Savannah when the Wadley Southern took charge, under consolidation, of the Stillmore Air-Line and the Wadley and Mt. Vernon. There was no change in the custom until 1909. Until then the shipper had the privilege of prepaying freight or forwarding it collect, except where
82 it was going to a prepay point, meaning a station at which
there was no agent located. Adrian has always been an agency station so far as I know, and not a prepay station. I have received notification from the Wadley Southern on the subject to prepay.

J. A. Streyer is General Freight Agent of the Macon, Dublin and Savannah, having been so for about 8 years.

The privilege to shippers over Macon, Dublin and Savannah about prepayment of freight to destination was withdrawn about the first part of August, 1909. They refused to accept any at all, and congested the freight at Rockledge. Prior to that they had frequently refused to receive some few shipments, and some would go through, but whether on their authority I could not say. The Wadley Southern does not accept shipments from the M. D. and S. at Rockledge unless the freight charges are prepaid. This refusal has been going on since the first part of 1909. Since March 11, 1910, Wadley Southern has refused to accept freight from the M. D. and S. unless freight charges are prepaid. They have not accepted any since March 10th, 1909, and have steadily and continuously refused to accept it down to the present time. I do not know of my own knowledge whether the privilege is granted to any other line or not.

83 Cross-examination of H. HERTWIG:

I am the chief clerk of the general freight agent of the Macon, Dublin and Savannah, having occupied that position during the entire 7 years of my connection with that road. Formerly I was revising clerk in the local agency of the Central, in other words, the joint agency of the Central and the Georgia Railroad at Macon. I presume I know enough about railroading to know that the revis-

ing clerk has the handling of all way-bills passing through the agency; it was my duty to revise and see that the revenue of the Central of Georgia Railway was properly charged on each and every way-bill passing through that agency, on freights going in or going out, therefore I know what happened at Macon. It is generally understood that the revising clerk would know something about the accounting between local agents. When I became connected with the M. D. and S., coming in contact with the various phases of railroading, I became familiar with the fact that it was the custom that one railroad would tender to another freight with accrued charges up to the junction point, to be forwarded to some point of destination over another line, with such charges as had accrued on it up to the junction point.

I do not know that when I was in the joint agency at Macon the Georgia Railroad refused and would not handle freight for points located on the Millen and Augusta branch of the Central,
84 and the same condition prevailed with the Central as to stations on the Georgia. It was an understanding between the two that they would not do it. I do not say it officially, but that is the understanding.

You can not always get into the inside of the arrangements unless you are on the inside of the general office. I understood that there was such an arrangement between the two railroads. All I know is that we were instructed not to do it.

Q. All you know about it is that they actually would not do the very thing you are saying was the general custom of railroads?

A. I said the custom of railroads was to accept and forward freight, charges collect, to points of destination on the connecting line, and my opinion in that respect still stands.

Q. And yet, when you get down to a concrete instance, the two railroads for which you worked would not do it on their local stations, respectively as between themselves; not asking you the reason, why do you insist, I am not asking you the reason, but the bare fact was that they would do it?

A. They did not do it, no sir.

Q. They did not?

A. No sir.

Q. Therefore, the knowledge that you acquired, was as far as the two railroads, you worked in general agency, and so far it covers the local officers of the road, is directly contrary to the practice
85 you have testified to, isn't it? You can answer that question yes, and that the two roads you worked for, their practice was directly contrary to the custom you have testified to?

A. No, I don't think you have put the question in exactly proper shape.

Q. In what respect is it wrong?

A. The conditions are so radically different that it would lead a person to believe that I was testifying to a fact, and I don't want them to feel that I am testifying in that way. I say the Central of Georgia and the Georgia did have an understanding.

Q. But hold on, your understanding was that they had an understanding, you are not testifying of your own knowledge?

A. That was my own understanding, and I know that was the rule that the local agent or the rule of the local agency which we were governed by.

Q. Do you undertake to say that it is not a fact that the Central had refused to accept shipments from the Georgia Railroad, and that the Georgia had refused to accept shipments from the Central, and instead of being an understanding it was a fact, are you prepared to say that it is not a fact?

A. No, I don't know that I am, but I know that they could not, according to the instructions of the agency. The Georgia Railroad would not accept and handle freight for points——

86 The Southern has a line from Macon to Atlanta and on north to Norcross, a local station in Georgia about 20 miles north of Atlanta. The Central has a line from Macon to Atlanta, but not to Norcross. I do not know that if the Central at Macon received a shipment consigned to Norcross and took it to Atlanta instead of letting the Southern take it to Atlanta, and demanded of the Southern the Central's charges accruing from Macon to Atlanta, when the shipment was going to the Southern's own local station and the Southern had its own line the whole way from Macon to Atlanta, that in the absence of any arrangement between the two the Southern would accept the shipment and advance the charges. I think the Southern would demand from the Central the delivery of the freight to the Southern at Macon. They would refuse to facilitate the Central in doing business that way. I know that it is a fact that it is the custom of railroads to protect their local territory. It is the custom with the Central and the Southern about whom you are asking me.

The Georgia Southern and Florida runs out of Macon to Jacksonville. The Central takes a shipment at Macon carries it to Savannah, delivers it to the Atlantic Coast Line, which carries it to Valdosta, and tenders it to the Georgia Southern and Florida for transportation to a station which we will call Smithville, ten miles from Valdosta. The route thus outlined is practically illogical,

87 and for that reason the Georgia Southern and Florida would refuse it.

It is not the general custom of railroads to permit their competitors to short haul when they have the opportunity to prevent it. If they can prevent it they won't allow them to short haul them.

I still say it is the general custom at junction points in the majority of places to accept freight with the charges collect to be forwarded to destination. These are exceptional cases, but I do not think there are a great many or a great number considering every feature of it. It is generally the exception in the cases where one railroad is trying to short haul the other. To a certain extent it is a fact that wherever roads feel that they have a legal right to do it they decline to make these advances.

I presume that the same custom exists at Collins between the Wadley Southern and the Seaboard as now exists at Rockledge be-

tween the Wadley Southern and the Macon, Dublin and Savannah.

I do not mean to say that if a new railroad were to build across another railroad today those two railroads would, without any correspondence and without a word passing between their officers, without any arrangement of any kind, immediately begin the interchange of freight and advance charges. They would likely, however form this contract or agreement. It is my idea that nothing is a contract that is not drawn up in a formal way; but
88 if I wrote a letter to Mr. Jordan proposing that the two roads would do something and Mr. Jordan replied, all right, that would be a contract; likewise, if I met him on the street and I proposed something and he said all right.

I can not say that I know of any particular instance in which it is the custom of railroads to interchange freights and advance charges accrued up to that point, in the absence of an arrangement to that effect. Any railroad building up to a junction point, where they could make a junction, would approach the other line for the purpose of arranging with them for the interchange of freight and advance charges. So far as I know there is always an arrangement between the two carriers when this is done.

The Wadley Southern has no freight agent in our station at Dublin. The way it prevents a shipper from shipping freight over our road without prepayment of freight is by refusing to accept goods from the M. D. and S. at Dublin without prepayment of freight. I do not know that freight is actually moving that way today, and that the Wadley Southern is actually collecting its proportion of its freight at Adrian. Yes, there is some moving, but it is being prepaid. Some of it goes forward prepaid and some of it goes forward collect, and it is tied up at Rockledge and we take it up with the consignee and secure from him the money to pay the freight charges, and then forward the shipment to destination.

We pay the Wadley Southern's charges too. The Wadley
89 Southern has not only refused to advance the charges, but requires that the charges be prepaid to destination. The refusal is in writing. Judge Hines has the letter, but it refers to a time prior to the Railroad Commission's order in this case. I do not know that I have anything since March 12th, 1910.

I can not say that I know of a single instance since March 11th, 1910, in which the Wadley Southern Railroad has demanded, as a condition of forwarding any freight from Rockledge to Adrian, that its freight from Rockledge to Adrian should be prepaid. I do not know of a single instance of such refusal since March 11th.

If you were to go down to our station in Dublin today and offer our agent freight for Adrian, and say I want to ship it not prepaid, there would be nothing in the way of your doing it, except that the Macon, Dublin and Savannah would refuse to accept it because the Wadley Southern would not accept it from them charges collect.

The Macon, Dublin and Savannah could take that freight which you tendered to them in Dublin and bring it to Rockledge and there turn it over to the Wadley Southern Railroad for transportation to Adrian, assuming that the Wadley Southern is willing to collect

their own part of the freight, and not ours. There is nothing to prevent the Macon, Dublin and Savannah from doing this except its desire to collect its own freight charges. That condition is such that we couldn't well do it. If we sent a bill to the
90 shipper afterwards what security could we have for our money? It is not customary for railroads to forward freight to any consignee and afterwards send him a bill for the charges. It is altogether unusual and out of the custom, and we might lose money by it. If a shipper proposed to do it we most certainly would refuse. The one that refuses to take goods from Dublin to Rockledge without prepayment of freight is the M. D. and S. on account of the Wadley Southern not accepting it from them. The Wadley Southern has not told our shippers that they must not ship that way, that they were going to require that our freight bills should be paid before they would take it because it is not customary for them to do it.

Sometimes freight is prepaid at point of shipment. This is true of quite a lot of certain commodities. Fertilizer is one of the largest items that railroads handle, and the majority of it is paid for at point of origin. It is one of the very heaviest items of tonnage of railroads. The majority of freight is handled collect, but there is quite an amount of it prepaid.

Redirect examination of H. HERTWIG:

A shipment of freight from Macon to Adrian forwarded collect would be billed out at the through rate from Macon to Adrian and divided by allowing the Wadley Southern its proportion of the freight, in the division of the rate from Rockledge to Adrian, and applying the remainder of that freight to the Macon, Dub-
91 lin and Savannah Railroad from *from* Macon to Rockledge.

Prior to the ruling of the Commission there was a general agent at Rockledge, and he would re-bill that shipment by applying the advance charges of the Macon, Dublin and Savannah Railroad as advance on his way-bill, and the remainder of it to the Wadley Southern from Rockledge to Adrian. That accounting would be settled between the two roads.

Payment by the Wadley Southern to the M. D. and S. would not be made on the spot. They have a general agent who makes up a weekly statement, dealing with himself. As the agent of the Wadley Southern he pays to himself, as agent of the M. D. and S. at the end of seven days for that is the periodical settlement. Four times a month they make a settlement sheet and he would pay whatever the difference might be from one to the other. They would have an accounting, and of course he keeps an account between one and the other. There is no payment of the money as soon as the freight is forwarded. He makes a settlement of the way-bills that he has handled every seven days. The general freight is collected at destination by the agent of the delivering line.

During my 16 or 17 years in the joint agency of the Central and the Georgia at Macon the custom I have testified to applied to all

connections for the interchange of freight between one another. We had settlements with the Southern, the Georgia Southern, the Macon & Northern, the Macon, Dublin and Savannah and the
92 Georgia. In shipments from Macon over the Central and then over the Wrightsville and Tennille, they accepted collect shipments which were billed to the Wrightsville & Tennille station via Tennille. The freight would be collected at point of destination.

So far as my knowledge goes, freight is collected by one railroad company for another at destination in the absence of any agreement; there was no agreement between the Wadley Southern and the Macon, Dublin and Savannah after the Wadley Southern acquired these two properties, except where you might take defendant's counsel's construction of a contract or agreement. Of course there is generally an agreement. When the Wadley Southern took over the Wadley and Mt. Vernon it was presumed that they would continue in the same manner that the former transportation line had.

I can not say exactly that there would always be an arrangement with every initial carrier consigning goods over a number of carriers, but it would be unusual for any transportation line to have a junction with another without one saying something to the other in reference to it. In the case of a western road, say the Santa Fe, shipment of a car-load of grain to Macon over the Macon, Dublin and Savannah, and over the Wadley Southern to Adrian, we would not have a specific agreement with the Santa Fe road before the freight would be collected, but would handle it by the published through rate. It would be forwarded in pursuance of the general custom to which I refer.

93 Recross-examination of H. HERTWIG:

The weekly settlements I refer to are made on the 7th, 14th, and so on in the month, and are made without reference to whether the delivering line has collected the freight charges or not, without waiting for the collection.

In case of the shipment over the Santa Fe referred to on re-direct examination, the M. D. and S. would not pay anything to the Santa Fe, but would pay it to their connection. Usually the Santa Fe would collect its charges from the road to whom it had delivered the goods, under the usual custom. There is a recent practice which has not been in vogue any great length of time which would change this, by which the M. D. and S. would settle direct with the Santa Fe.

Second redirect examination of H. HERTWIG:

It is the general custom of carriers delivering freight to collect the charges at destination before delivering freight.

E. N. WILLIE testified for the State.

I was freight agent of the Louisville and Wadley Railroad about 18 years. I have knowledge of the custom prevailing among railways about collection of freights where the freight is shipped over

one or more connecting lines and finally delivered to the consignee by the delivering carrier. During the time I was connected with them the Louisville and Wadley shipping anything to a point on the Central charges collect, freight would move forward to that point
94 and the Central would collect the freight there. If anything was shipped over the Central to Louisville it was reversed. For instance, the L. & N. a connection of the Central, would ship something here, the Louisville and Wadley would collect the whole charges here, if it was a collect shipment, and settle the entire amount of charges with the Central, and they would settle the L. & N. proportion with them. So far as I know that was the general custom with railroads at that time. I quit four or five years ago.

I handle accounts here with the Wadley Southern, the Stillmore Air-Line, and the Central. The Louisville and Wadley would make settlements at the end of the month, sending to each road its part. The freight was not advanced to the initial carrier right at the time of the transfer, but was settled between them at the end of the settlement period, about once a month. I understand now this period is every seven days. There was no advance made at the time, only at the regular settlement periods. Under this custom the final carrier would collect the total charges from the consignee if it was a collect shipment, and if it was a prepaid shipment the initial road would collect all the charges.

Cross-examination of Mr. E. N. WILLIE:

I found this custom existing when I came into the railroad service. The settlements which are now weekly were then made monthly. The period is arranged by agreement between the railroads. When I was there we agreed on monthly settlements. The arrange-
95 ment was a matter of agreement between the carriers. I know of no custom between them in the absence of an agreement. I don't know whether they all agreed or not. I know nothing in regard to the general custom among railroads except in so far as it came within my personal observation. That was the custom with these three or four roads, and that is all I know about it.

Redirect examination of E. N. WILLIE:

I received freight that originated with other railroads, but the settlement was made with the road to whom they delivered it. I can only speak in regard to settlements with roads connecting with the Louisville & Wadley. That was the custom with them, but as to arrangements with other connections, I do not know how they settled.

O. L. ANDERSON, testified for the State.

I have been in the service of the Macon, Dublin and Savannah 18 or 20 years, as operator, then as agent, and now as general agent. I have had a little experience with the Wadley Southern at Rockledge and have had to go there two or three times to prepay freight that was held up there refused by the Wadley Southern on account of not being prepared. Since March 12th, 1910 it has refused to receive

freight shipped over the M. D. and S. to points on their line unless the freight was prepaid. Shippers can now in a way ship their freight over the M. D. and S. to points on the Wadley South-
96 ern without being prepaid. We receive freight at Dublin; if a man offers us freight there for Adrian we put him on notice that the Wadley Southern will refuse to take it unless that freight is prepaid, and we will send it to Rockledge and the freight must be prepaid there, or we will collect it out of the shipper. We have to do that before it moves from Rockledge. I do not know of a single instance where shippers have shipped their freight over the M. D. and S. and then to point of destination since March 12th, 1910, unless the freight was prepaid. They have refused to do it.

It has had a pretty bad effect. Adrian has been a dull point for us; we used to have a pretty good patronage there before, and they continued to keep that up until the Railroad Commission passed up this order ordering the Wadley Southern to move that freight properly, and after they passed that order they still refused to take it, and my patrons at Adrian tell me that they would like to have their freight shipped over the M. D. and S. but they could not afford to have it shipped that way over the M. D. and S. and have it held up there and have to prepay the freight before they could get it, or get on the train and pay railroad fare to Rockledge and back, besides paying the freight, and for that reason they could not patronize our line under those circumstances.

Cross-examination of O. L. ANDERSON:

By prepay freight I mean that it would have to be prepaid before it gets to Adrian. The agent at Rockledge has told me he
97 had instructions from his officials not to accept freight unless it was prepaid. There have been cases where the freight charges were paid to Rockledge and then moved from Rockledge to Adrian and collected. There are cases where the Wadley Southern has moved the freight and collected its charges at Adrian. The Wadley Southern will move these shipments and collect its own freight but will not collect freight of the M. D. and S. at Adrian. I guess they will do that anywhere. We have never asked them to act as a collecting agency for us at Adrian. We do not call on them for our charges. They have the benefit of our money for seven days. I do not consider it an advance for them to settle with us weekly, because if they have not collected the freight it is their own fault. It is its fault or the consignee's. The delivering road has had that much money. It has a recourse on the goods, and, if it has got the goods it is making so much per day a hundred pounds for storage; so that is really to his advantage. Storage of goods gives no value for the storage that is charged. The M. D. and S. charges storage. It gives value. We get a cent a day per hundred pounds for every day that it is there. It does not cost anything for the shelter of it, the storage of it. I did not say that my position was that there was no value given for storage.

I consider an advance paying for something before you get it.

The Wadley Southern don't advance money to us before they get it out of the freight. If they paid money to us before they got
98 charge of the freight it would be an advance, otherwise it is not an advance.

I testify that I do know of cases where they have moved it from there collect and collected their own charges, and I guess they will do that anywhere. They refuse to take it from our line at Rockledge with any charges whatever on it. We have nothing to do with the Wadley Southern's freight from Rockledge to Adrian. The Wadley Southern has got to be paid for carrying it to Adrian, and I have not got anything to do with that. I do not say that the agent requires prepayment of freight from Rockledge to Adrian.

The agent did not say that he would not receive any freight with charges from Rockledge to any point on the Wadley Southern. I did not have anything to do with charges there. I do not know anything about what their policy is with the freight from Rockledge on. What I know is that they refuse to take anything collect so far as the charges back of Rockledge are concerned. The agent at Rockledge did not speak of prepayment of freight to stations on the Wadley Southern, but for stations on the Wadley Southern. I have not heard the agent say anything that would show that the Wadley Southern required their freight to be prepaid to stations on their line. I do not know that they required that with reference to their own line.

99 The State introduced in evidence the following letter to the defendant from the Secretary of the Railroad Commission:

File 8957.

"RAILROAD COMMISSION OF GEORGIA,
ATLANTA, *March* 31, 1910.

Mr. H. A. Jordan, G. F. A., Wadley Southern Railway Co., Swainsboro, Ga.

DEAR SIR: On March 12, 1910, I wrote you enclosing copy of order issued by the Commission on March 11th, in the matter of refusal of your Company to accept freight from the Macon, Dublin and Savannah Railroad Company at Rockledge, Ga., without the prepayment of freight charges. Up to this date we have had no acknowledgment of this order. I have been directed by the Commission to write you and inquire what your company has done toward carrying into effect the terms of the Commission's order above referred to, and if you are complying with the directions as therein contained. Please give us a response to this letter by first mail.

Yours very truly,

CAMPBELL WALLACE, *Secretary.*"

The State here closed.
The defendant moved for a nonsuit.
The motion was denied by the court without opinion.

100 H. A. JORDAN testified for the defendant:

I am and have been for about two years and three months general freight and passenger agent for the Wadley Southern, and am familiar with the facts in connection with this controversy.

The Central of Georgia is the preferred connection of the Wadley Southern. It makes us an allowance larger than the allowance based on mileage on through shipments passing over the line of the Central and the lines of the Wadley Southern. Under similar circumstances the M. D. and S. gives us only the mil-age allowance.

Probably 75% more of our business coming over other roads comes from the Central of Georgia. The Central prefers the Wadley Southern as a connection.

The instructions out of which this controversy has arisen were given by me. My instructions are contained in the following circular:

"In order to prevent the receipt of any freight at Collins, Ga., or Rockledge, Ga., that will be overcharged at destination, you will please be very careful to observe the following:

On shipments originating within the State of Georgia received from the Seaboard Air-Line Ry. at Collins, or the Macon, Dublin and Savannah Ry. at Rockledge, Ga., charge your local rate (Local Freight Tariff No. 1) less ten (10%) per cent. except on fertilizer on which we are entitled and must receive our full local rate.

101 On interstate business, that is business originating beyond the State of Georgia, our full local rate must be applied.

In every case the freight to Collins and Rockledge, Ga., must be prepaid.

Agents at destination in revising billing will be careful to see that the Wadley Southern Ry. is accorded revenue in accordance with the above, correcting any error that may have been overlooked by the agents at Collins, Ga., and Rockledge, Ga., before the delivery of freight is made to consignee.

Please acknowledge receipt and advise if understood."

I have never required that freight accruing to the Wadley Southern road, that is the Wadley Southern's own charges, to be collected by the Wadley Southern Railroad, be prepaid on any shipments from the Macon, Dublin and Savannah. I do not require it now, nor have I required it since the 11th of March, 1910. I have not required the prepayment of freight on such shipments, and do not require it now. What I have refused to do is to advance to the M. D. and S. money for their freight accruing up to Rockledge. That is all I have done.

Cross-examination of H. A. JORDAN:

I signed the letter of July 8th, 1909, to W. P. Ivey, agent at Rockledge, which you show me; and also letter of the same date to J. A. Streyer, G. F. A. at Macon. He is the General Freight Agent of the M. D. and S., and also the letter to the same J. A. Streyer, dated August 10th, 1909.

102 W. P. Ivey was the joint agent of both roads at Rockledge, appointed by the M. D. and S. and accepted by us.

A patron of the M. D. and S. cannot make a shipment from any point on that road unless the freight is prepaid up to Rockledge. We will not receive it and collect the entire charges at the point of destination. We have continuously refused to do this up to date. We received the order of the Commission in March. I do not remember the date.

I signed the letter of July 14th, 1909, addressed to W. P. Ivey at Rockledge, but the letter was corrected. There was an error in it which was subsequently corrected.

Redirect examination of H. A. JORDAN:

Where in one of my letters to Mr. Streyer I speak of shipments tendered without prepay, the word "prepay" means that shipments should come to us without any charges at Rockledge. It was so understood by Mr. Streyer, not only in correspondence, but in several discussions that we had, and there was absolutely no doubt about it.

The letter of July 14th, 1909 to Ivey, reads that the shipments should be prepaid to destination. Ivey was afterwards removed, and with the next agent that error was discovered and was corrected to the new agent that came in, so there would be no doubt about our position. It was discovered to be an error on our
103 part. I do not remember when the error was corrected. Mr. Ivey was there a very little time because he was unsatisfactory.

This controversy with the M. D. and S. has gone on for some time and the nature of it was thoroughly understood between us. They knew to what I referred *to*.

Recross-examination of H. A. JORDAN:

The agent to whom I made the correction was, I think, Holmes, who succeeded Ivey; it may have been verbal and it may have been in writing. I have a letter here to — agent that succeeded that one, putting it in writing. The letter indicates that I sent a copy of it to the M. D. and S. Railroad. (Witness produces letter of October 4th. 1910, afterwards introduced in evidence by the State.) I do not now recall any other corrections but that one. As a matter of fact there has never been any requirement by the Wadley Southern of the prepayment of freight over the line of the Wadley Southern as a prerequisite to the shipping of goods over the Wadley Southern.

Defendant closes.

Testimony in Rebuttal by the State.

The State introduced the following letters:

OCTOBER 4, 1910.

Interchange: With the M. D. and S. Ry. & S. A. L. Ry.

Mr. W. K. Jordan, Agent, Rockledge, Ga.

104 DEAR SIR:—Your letter of the 1st instant to Mr. Holloman has been referred to me for attention. I am returning

herewith papers and also a copy of our embargo, dated Aug. 24, 1908. I am not prepared to give you the number of the M. D. and S. Ry. re-issue of this circular, but S. A. L. circular No. N. W. 243 of June 17th, 1909, issued by the Seaboard Air-Line covers.

Yours truly,

H. A. JORDAN,
General Freight Agent.

SWAINSBORO, GA., *July 14th*, 1909.

File No. F. D.—9—A.

Mr. W. P. Ivey, Agent, Rockledge, Ga.

DEAR SIR: I notice the following recent shipments passing Rockledge without proper prepayment in accordance with instructions from this office:

"Rockledge m/b 23, July 10th, 3 sacks coal for J. R. Bragg, Adrian, originating at Macon. Rockledge m/b 20, July 10th, sugar for Johnson & Spell, Adrian.

We must insist on your declining to forward shipments unless fully prepaid to destination.

Please acknowledge receipt and advise me if you fully understand your instructions.

Yours truly,

H. A. JORDAN,
General Freight Agent."

LAWTON & CUNNINGHAM,
R. L. GAMBLE,
Attorneys for Defendant.

105 Agreed to as a correct brief of the evidence, January 17, 1911.

JAMES K. HINES,
Attorney for State of Georgia.
LAWTON & CUNNINGHAM,
R. L. GAMBLE,
Attorneys for Defendant.

Approved.

B. T. RAWLINGS,
Judge Superior Court, Jefferson County, Georgia.

January 21st, 1911.

Filed in office January 24th, 1911.

W. S. MURPHY, *Clerk.*

6th. The Charge of the Court.

Jefferson Superior Court. November Term, 1910.

Judge B. T. Rawlings, Presiding.

106 Suit for Penalty.

THE STATE OF GEORGIA
v.
THE WADLEY SOUTHERN RY. CO.

Charge of the Court.

GENTLEMEN OF THE JURY: This is a suit sounding the State of Georgia against the Wadley Southern Railway Co. The object of the suit is to ascertain, by your finding, whether or not there has been a violation of an order issued by the Railroad Commission of the State of Georgia by the Wadley Southern Railway Company, and in consequence the imposing of a penalty.

The defendant, Wadley Southern Railway Company answers the allegations set out and contained in the charges made in the petition, and denies any liability or right to impose the penalty by reason of its conduct in the operation of its affairs as a corporation. These charges laid in the petition and the denials set up in the answer form an issue which you are called upon to pass upon and determine.

In passing upon this issue formed by the pleadings the jury selected to try the case become the judges of the evidence in the case; it is the province of the jury to ascertain and determine
107 what has been proven, and what has not been proven in the case; it is also the province of the jury to ascertain and determine the weight and credit to which all the testimony introduced is entitled at your hands. In arriving at this conclusion you may observe the witnesses as they testify during the trial of the case, their demeanor and conduct upon the stand; you have the right to take into consideration, in so far as same may appear, as to whether or not any witness testifying is in any wise interested in the result of the trial, any bias or prejudice on the part of the witness; the interest or want of interest in the result of the case, the reasonableness or unreasonableness of the testimony of the witness and the opportunity he may have of knowing the facts which he relates to the jury; all of these matters may be, by the jury, considered in reaching a correct conclusion as to the weight and credit which all of the testimony presented during the trial of the case may deserve at your hands.

Where during the trial of a case the jury realizes that there is a conflict in the testimony, it becomes the duty of the jury to reconcile the conflict, if they can, so as to give effect to all of the testimony introduced. If, however, you find here is a conflict which you

can not reconcile, then you take the entire testimony and search it for the truth of the transaction between the contention of the State and that of the defendant, and wherever you find the truth
108 to be let it influence, control and shape your verdict. The object of the trial is that you ascertain the truth of the issue as made.

I will briefly state to you the contentions of the parties, plaintiff and defendant, but in stating these contentions it would not be proper, and it is not the purpose of the court, to express or intimate any opinion about what the truth of the transaction may be, or what has been proven; those are questions for the jury to determine. You are the sole judges of the evidence in the case.

It is contended by the State that the defendant, the Wadley Southern Railway Co. is a railroad corporation operating a line of railroad from Collins to Wadley, and from Wadley to Rockledge, in the State; it is contended by the State that the northern end of that railroad connects with the Central of Georgia at Wadley, and that the southern end of it connects with the Macon, Dublin and Savannah at Rockledge; it is contended by the State that the operations of the affairs of the Wadley Southern Railway Co. and that branch of it that runs from Wadley to Rockledge that they received freight, or heretofore did receive freight at Wadley and at Rockledge, to be shipped and transported by them to points along the line of the Wadley Southern Railway Co., it is contended by the State that at Wadley the Wadley Southern Railway Company
109 does not require freight to be prepaid, but that articles shipped by the Central of Georgia Railway Co., destined for points along the line of the defendant company, are shipped without prepaying the freight at Wadley; it is contended by the State that the Wadley Southern Railway Co. for freight being shipped over the Macon, Dublin and Savannah Railway, and leaving the Macon, Dublin and Savannah at Rockledge, destined for points along the line of the Wadley Southern Ry.; that the Wadley Southern Ry. requires a prepayment of freights at Rockledge. The State contends that this is a discrimination against the Macon, Dublin and Savannah Railroad, or freight going over that line of railway, and in favor of the freight going over the Central of Georgia Railway by Wadley. The State contends that this is an illegal procedure, and it maintains this suit for the purpose of obtaining at your hands a verdict setting up these facts in order that a penalty may be imposed upon the defendant corporation for the violation of the rule or order issued by the Railroad Commission of the State of Georgia; they contend that there has been a rule issued and that that rule has been violated, and this suit is maintained for the purpose of having you pass upon the facts, and declare the violation of that rule by your verdict, and in consequence the imposition of a penalty upon the defendant corporation.

110 The defendant corporation, the Wadley Southern Railway Company, on the other hand, contends that it is not liable under this petition; that they have not violated any rule of the Railroad Commission; they contend that there has been no proof to

show that there has been any discrimination; that while a suit had been maintained there is no proof introduced to show that there has been any discrimination; it contends that it is not liable and should not pay any penalty under this proceeding.

Now these are substantially the contentions of the plaintiff and the defendant in this case; as to what has been proven is a question for you to determine by looking to the facts and circumstances appearing. You take into consideration all the facts and the circumstances as you understand them to be, and apply the principles of law which will be hereafter given you in charge of those facts, and reach what you conceive to be a true verdict.

I charge you that if you find that after the 12th day of March, 1910, the Wadley Southern Railway Company has exacted prepayment of freights for shipments going over the Macon, Dublin and Savannah Railway Co. destined for points on the line of the Wadley Southern Railway Co., and you find that shipments have been made destined for points along the line of the Wadley Southern Railway Co. over the Central of Georgia Railway Co., and that a like line of dealing was not adopted or required at Wadley for freights
111 shipped by the Central of Georgia Railway Co. destined for points along the line of the Wadley Southern Railway Co., that is that branch of it running from Wadley to Rockledge, and you believe and find that there has been discrimination in favor of the shipments by the Central for the Wadley Southern, and against shipments transported over the Macon, Dublin and Savannah Railroad Co. at Rockledge, *at* you believe such to have been established by the preponderance of testimony in this case, then you will be authorized, and it will be your duty, to find in favor of the petition, that is find the defendant guilty.

On the other hand, if you find from the facts and circumstances in the case that there has been no discrimination in favor of shipments transported via the Central of Georgia Railway Co., and that there has been no discrimination against shipments transported over the Macon, Dublin and Savannah Railway Co. by the requirement of the prepayment of freights at Rockledge, then you will be authorized, and it will be your duty, to find the defendant not guilty.

You take into consideration all the facts and circumstances as reflected by the trial of the case, and determine what the truth is, and if you find and determine from such facts and circumstances that there has been on the part of the Wadley Southern Railway Co. an exaction of the prepayment of freights at Rockledge
112 on shipments delivered or tendered to the Wadley Southern Railway Co. by the Macon, Dublin and Savannah Railway Co. destined for points on the Wadley Southern, and that no such exaction of payment of freight charges was made on shipments of freight transported over the Central of Georgia Ry. Co. and delivered at Wadley for the Wadley Southern Ry. Co., then it will be your duty to find the defendant guilty; and the form of your verdict would be; We, the jury, find the defendant guilty.

If you believe and find that there was no discrimination exercised at Rockledge, by exacting prepayment of freights, then you will be

authorized to find the defendant not guilty, and the form of your verdict would be: We, the jury, find the defendant not guilty.

Anything further, gentlemen? (No response).

Retire gentlemen, and make up your verdict.

Filed in office, January 24th, 1911.

W. S. MURPHY, *Clerk.*

113 7th. *The Verdict of the Jury and the Judgment of the Court Thereon.*

We, the jury, find for plaintiff.

W. E. JOSEY, *Foreman.*

Whereupon it is considered, ordered and adjudged by the court that the plaintiff, the State of Georgia, do recover of the defendant, the Wadley Southern Railway Company, the sum of one thousand dollars, and all costs of this suit to be fixed by the clerk of this court.

This November 17th, 1910.

B. T. RAWLINGS, *J. S. C. M. C.*

Order Overruling Motion for New Trial.

At Chambers Jan. 21, 1911.

After hearing argument on the within motion for new trial the same is hereby overruled and a new trial refused.

B. T. RAWLINGS,
Judge S. C. M. C.

114 Clerk's Office, Superior Court of Jefferson Co., Ga.

LOUISVILLE, GA., *February 27th,* 1911.

I hereby certify, That the foregoing 91 pages hereto attached, contain a true transcript of such parts of the record as are specified in the bill of exceptions and required by the order of the Presiding Judge, to be sent to the Supreme Court in the case of Wadley Southern Ry. Co., Plaintiff in Error, v. The State of Georgia, Defendant in Error.

I further certify, That the November term of said court, at which said case was tried, adjourned November 18th, 1910. All of which appears from the records and minutes of said court.

Witness my signature and the seal of said court, affixed the day and year first above written.

[SEAL.]

W. S. MURPHY,
Clerk Superior Court Jefferson County, Georgia.

115 (Endorsed: No. 6 Middle Circuit Supreme Court of Georgia. March Term, 1911. Wadley Southern Ry. Co., Pl'ff in Error, v. State of Georgia, Defendant in Error. Transcript of Record. Lawton & Cunningham, Savannah, Ga. Filed in office this 2d day of March, 1911. W. E. Talley, D. Clerk Supreme Court.

116 6, Middle, March Term, 1911.

WADLEY SOUTHERN RAILWAY COMPANY
v.
THE STATE.

By the COURT:

1. The railroad commission Act of 1907 (Acts 1907, p. 72) does not offend article 3, section 7, paragraph 8, of the constitution of Georgia on the ground that the 12th section of the act contains matter different from what is expressed in the title.

2. Section 6 of the railroad commission act of 1907 (Civil Code (1910), §2663) contemplates that notice and an opportunity of a hearing be given to persons, railroads, or other corporations interested in the orders issued by the commission, and that provision may be made for such notice either by statute or rule of the commission. This section is to be construed to mean that the commission shall not issue a special order in a particular case, directed to a person or corporation, without first giving notice and an opportunity for hearing to the person or corporation so to be affected thereby.

3. A State statute which confers on a railroad commission the power to require railroads to afford the usual and like customary facilities for interchange of freight to patrons of each and all routes
117 or lines alike, and to make just and reasonable rules for preventing unjust discriminations, and provides for notice and an opportunity of a hearing of the railroad company to be affected by any order of the commission, and for a violation of an order of the commission imposes a penalty on the corporation in a sum not to exceed $5,000, in the discretion of the trial judge, and also subjects any person violating or abetting the violation of the order to punishment for a misdemeanor, does not offend the constitutional guaranties of due process of law and the equal protection of the laws, in that the railroad to be affected by the order is prevented from testing the validity of the statute or the order of the railroad commission because of excessive penalties.

4. The Georgia railroad commission act invests the railroad commission with power to require railroads to afford the usual and like customary facilities for interchange of freight to patrons of each and all routes or lines alike, and to make reasonable rules for preventing unjust discriminations. Under this power it is competent for the commission to declare as an unlawful discrimination a course of conduct whereby a railroad company, connecting with other railroad companies at each of its termini, which converge to a common point, affording a choice of routes from the common point to sta-
118 tions on its own line, receives from one of its connections freights destined to points on its own line without requiring prepayment of the earned charges of the favored carrier, and declines to receive from the connecting carrier at the other terminus freight destined to points on its own line without prepayment of the freight charges earned by that connecting carrier, where the conditions are substantially similar, and the effect of the course of conduct is to

seriously curtail competition in rates and service to the patrons on its own line.

5. The action was properly authorized by the Governor.

6. The admission of irrelevant and immaterial evidence, not prejudicial to the losing party, is not cause for a new trial.

7. An exception to the refusal of the court to allow a witness to answer a stated question is insufficient where the answer to be elicited is not given.

8. The charge was adjusted to the law and facts, and was free from substantial error. The evidence authorized the verdict.

119 The action is by the State of Georgia against the Wadley Southern Railway Company, to recover a penalty for disobedience to an order of the Railroad Commission of Georgia. The Central of Georgia Railway Company, a domestic corporation, owns and operates a line of railroad from Macon to Wadley and beyond. The Macon, Dublin & Savannah Railroad Company owns and operates a railroad from Macon to Rockledge. The Stillmore Air-Line Railway Company operates a railroad from Wadley to Collins, where it connects with the Seaboard Air Line Railway Company. The Wadley & Mount Vernon Railroad Company operates a line of railroad from Wadley to Rockledge. In 1906 the Stillmore Air-Line Railway Company and the Wadley & Mount Vernon Railroad Company merged into a new corporation called the Wadley Southern Railway Company, which was duly chartered under that name. The Central of Georgia Railway Company is the owner of all the stock and bonds of the Wadley Southern Railway Company. Adrian is a station on the Wadley Southern Railway Company between Wadley and Rockledge, being twenty-seven miles distant from Wadley and ten miles distant from Rockledge. On August 17, 1909, certain merchants and business men of Adrian addressed a petition to the Railroad Commission of Georgia represent-

120 ing that "The Wadley Southern refuses to handle freights delivered them at Rockledge by M. D. and S., without freight charges being fully prepaid to Rockledge," and praying the interposition of the Railroad Commission in aid of interchange of freights at that point. A hearing was had upon this petition; and on March 16, 1910, the following order was passed by the Railroad Commission of Georgia: "In Re Refusal of the Wadley Southern Railway Company to accept freight from the Macon, Dublin and Savannah Railroad Company, at Rockledge, Georgia, without the prepayment of freight charges. * * * The Commission having heard evidence and argument of counsel in the foregoing complaint as to discrimination alleged to be practiced by the Wadley Southern Railway Company as against shippers to Adrian, Georgia, over the line or route of the Macon, Dublin and Savannah Railroad Company via Rockledge, Georgia, and in favor of shippers over the line or route of the Central of Georgia Railway Company at Wadley, Georgia, and it appearing that the alleged unlawful discrimination arises out of the requirement of the Wadley Southern Railway Company that shippers shall prepay charges via Rockledge before it will

receive freight at that point from the Macon, Dublin and
121 Savannah Railroad Company for Adrian, but does not require like prepayment of charges on freight via the Central of Georgia Railway Company at Wadley, thus affording facilities to patrons of the Central of Georgia Railway Company's line or route, for the interchange of freight, denied to patrons of the Macon, Dublin and Savannah Railroad Company's line or route, and it appearing that the Macon, Dublin and Savannah Railroad Company's line or route via Rockledge is a competitor of the Central of Georgia Railway Company's route or line via Wadley for freight moving to Adrian and other points on the Wadley Southern Railway Company between Rockledge and Wadley, and that the rule or requirement of the Wadley Southern Railway Company complained of is intended to afford and does afford to patrons of the Central of Georgia Railway Company facilities denied to patrons of the Macon, Dublin and Savannah Railroad Company, a connecting line of the Wadley Southern Railway Company, and a competitor of the Central of Georgia Railway Company for Adrian business, which interferes with the exercise of the freedom of choice in routes by shippers, the Commission is of the opinion that the practice complained of is, under the law of Georgia, an unlawful discrimination, and such a discrimination as the Commission is required by law to forbid. It is therefore ordered, that the Wadley Southern Railway Company at once desist from the discrimination specifically complained of in
this case. Ordered further, that the Wadley Southern Rail-
122 way Company, on and after the receipt of this order, afford to patrons or shippers over the line of the Macon, Dublin and Savannah Railroad Company via Rockledge the same facilities for the interchange of freight afforded to patrons or shippers over the line of the Central of Georgia Railway Company via Wadley." Notice of this order was duly communicated to the general freight agent of the Wadley Southern Railway Company, and its attorneys replied that they had advised that company that "the order of the railroad commission is not legal, and that the railroad company is not legally bound to observe it." Whereupon his Excellency, the Governor, passed the following order: "In Re Wadley Southern Railway Company. Refusal to accept at Rockledge, Georgia, freight from the Macon, Dublin and Savannah Railway Company, unless freight charges are prepaid. Whereas, the Railroad Commission of Georgia having notified me that the Wadley Southern Railroad Company has refused to obey the order of said commission directing that said Railway Company should receive freight from the Macon, Dublin and Savannah Railroad Company without requiring prepayment of freight charges, which refusal it is claimed by such Commission is an unauthorized and illegal discrimination under the facts, and subjecting the said company to a penalty for a violation of the Commission's orders. It is therefore ordered, in conformity with the act approved August 23rd, 1907, that suit be instituted
by the Special Attorney of the Railroad Commission in the
123 name of the State of Georgia for the recovery of such penalty." In pursuance of this order a petition was filed in the

name of the State to recover of the Wadley Southern Railway Company $5,000 penalty as provided by the act approved August 23d, 1907. The petition contained two counts. The first count alleges that the railroad company has failed and refuses to obey, observe, and comply with the order of the commission, whereby they became indebted to the State of Georgia in a sum not to exceed $5,000. The second count alleges, that, since July 6, 1909, the Wadley Southern Railway Company has refused and still refuses to receive freight from the Macon, Dublin and Savannah Railroad Company at Rockledge, Georgia, for points on its line, without prepayment of the freight, while during all this period the company has received and still receives from the Central of Georgia Railway Company at Wadley, Georgia, freights shipped from Macon, Georgia, and other points along its line of railroad, without prepayment of the freight and in this way the Wadley Southern Railway Company has discriminated against the M. D. and S. Railway Company, one of its connecting lines, in favor of the Central of Georgia Railway Company, another of its connecting lines, and thus fails and refuses to afford the usual and customary facilities for the interchange of freight to the patrons of each of said routes and lines alike, contrary to the provision of the statute in such cases made and
124 provided. The Wadley Southern filed its answer, denying its liability under either count, and attacked the constitutionality of the law providing for the penalty. A trial was had, and a verdict was returned finding the railroad company subject to the penalty. A new trial was refused, and a bill of exceptions was sued out, complaining of the judgment refusing a new trial and various interlocutory rulings.

EVANS, *P. J.*:

1. We will first consider whether the railroad commission act of 1907 (Acts 1907, p. 72) contains any of the constitutional infirmities urged against it. The title is "An act to increase the membership of the Railroad Commission of Georgia * * * to prescribe and fix penalties and punishments for failure and refusal to obey any order, rule or regulation of the Railroad Commission; to prescribe the form of procedure for enforcing the same; and for other purposes." The 12th section (Civil Code (1910), §2667) provides that "any common carrier * * * which shall violate any provision of this act or the acts heretofore passed, or which fails, omits or neglects to obey, observe, or comply with any order, direction or requirement of the commission * * * shall forfeit to the State of Georgia a sum not more than five thousand dollars for each and every offense, the amount to be fixed by the presiding judge."
125 It is contended that art. 3, sect. 7, par. 8, of the constitution of Georgia, to the effect that no law shall pass which contains matter different from what is expressed in the title, has been violated by the inclusion in the 12th section of matter not referred to in the title, in so far as it undertakes to give to the State a right of action for a violation of "any provisions of this act or of the act heretofore

passed, whereas the title refers only to penalties for the failure and refusal to observe, any order, rule or regulation of the Railroad Commission." The general scope of this legislation was to retain to the railroad commission the power and authority heretofore conferred upon it by law, except as changed by the act, and to confer additional powers upon the commission, with the view that the commission should be vested with a general supervision over public service corporations, with power to require them to establish and maintain such public service and facilities as may be reasonable and just. Some of the rules for the regulation of railroads which were designed to be enforced by the commission were in the form of statutes, but they were nevertheless binding on the commission, and all parties to be affected, as rules; just as much so as if such rules had been promulgated by the commission. It was competent for the legislature to deal with these statutory provisions as rules prescribed for the commission to enforce; and the act did not offend the constitutional provision as contended. Richardson v.
126 Macon, 132 Ga. 122.

2. It is said that the statute giving validity to the orders of the railroad commission, which is the basis of this suit, do not provide for notice and hearing, nor do the rules of the commission so provide, and therefore due process of law is not afforded. The commission act of 1907 enlarged the powers of the railroad commission so as to give it jurisdiction and power over practically all public service corporations. In defining the jurisdiction the sixth section of the act (Civil Code (1910), §2663) declares that the railroad commission shall have and exercise all power and authority heretofore conferred on it by law, and shall have general supervision over railroads and other public-service corporations. In the exercise of its powers it was provided that it may proceed on its own initiative or on the complaints of others, and may require all common carriers and other public-service companies under its supervision to establish and maintain such public service and facilities as may be reasonable and just, either by general rules or by special orders in particular cases, "provided that nothing in this section shall be so construed as to repeal or abrogate any existing law or rule of the commission as to notice or hearings to persons, railroads, or other corporations interested in their rates, orders, rules, or regulations issued by said commission before the same are issued, nor to
127 repeal the law of this State as to notice by publication of a change in rates." The most casual reader of this section can not fail to be impressed that the legislative purpose was to afford parties affected by any order in a particular case an opportunity to be heard in advance of its promulgation by the commission. While the literal application of the proviso concerns the preservation of existing statutes, and orders of the commission, with respect to notice and hearings, yet the implication is so pregnant of the legislative conception that such specific orders of the commission must be made only after notice and hearing, that it would be doing violence to the legislative plan of supervision by the commission to construe the act so as to impute a contrary purpose and intent. It was con-

templated that provision for notice should be made by statute or rule of the commission. Special statutory provision was made as to notice of a hearing for joint rates to roads that are not under the management of the same company, and as to the requirement about the location of depots (Civil Code (1910), §§2631), but as to other matters the legislature left it to the commission to formulate rules respecting notice and hearing. Although the reference in the clause relating to notice was to the preservation of existing statutes and rules of the commission, there is no negation that the com-
128 mission might not from time to time amend or enlarge its rules so as to give other or additional notice. There is nothing in the present record contradicting the existence of a rule of the commission providing for notice at the time of the passage of the act of 1907, nor is there any contention that the Wadley Southern Railway Company did not in fact have notice of the hearing in the particular case. The defendant pleaded that the law did not provide for a hearing on the facts, and that for this reason it violated the constitutional guaranties of due process of law, and the equal protection of the laws. The burden was on the railroad company to sustain its plea by submitting proof of the absence of any rule of the commission providing for notice and a hearing. Civil Code, §2626. It wholly failed in this particular, and we are bound to assume that there was a rule of the commission as contemplated in the statute.

With regard to the complaint in the plea that the act made no provision for an appeal, it has been settled by the Supreme Court of the United States that due process of law, as guaranteed by the 14th amendment, does not require that an appeal shall be provided for a party who has had one hearing before a competent tribunal, with full notice as to the time and place of hearing. Mich. R. R. Co. v. Powers, 201 U. S. 301, 302.

It will be observed that the point raised in the plea is the
129 non-existence of any rule of the commission, and not any deficiency of the rule. As the defendant failed to show the non-existence of any rule of the commission, or, if there was a rule, that it was faulty in any respect, the latter question can not arise in this case.

3. It is urged that the provisions of the act of 1907 (Civil Code (1910), §§2667, 2668) prescribing penalties are unconstitutional as being a denial of due process of law and the equal protection of the laws, as guaranteed by the constitution of the State of Georgia and of the United States, because of their excessive penalties. The first of these sections subjects a public service corporation to a penalty not to exceed $5,000 for each and every violation of any provision of that section, or of acts heretofore passed, or of any order of the commission, the amount of the penalty to be fixed by the presiding judge. The latter section declares that every officer, agent or employee of the corporation, violating or abetting the violation of any statute or of any order of the commission, shall be guilty of a misdemeanor. The general policy of the act of 1907, as well as of the previous acts pertaining to the regulation of railroads, etc., is to

devolve upon the railroad commission the duty of formulating rules and regulations, rather than to do so by direct enactment. The
legislature has not undertaken by statute to establish either
130 passenger or freight rates, but has referred the ascertainment
of just and reasonable rates to the railroad commission.

The penal feature is the force of the law; and to deny the right of the legislature to impose appropriate penalties for violations of orders of the commission, which the commission is authorized to issue after due notice to the corporation to be affected, and on the fullest investigation, would in effect be a denial of the power of the State to regulate public-service corporations by commission or other administrative agency. The power of the legislature to create a commission to regulate public-service corporations, and to prevent unjust discrimination by them, is too well established in the jurisprudence of this State to be contested at this late day. Georgia R. v. Smith, 70 Ga. 694. The distinction is obvious between a case where the statute imposes a penalty for disobedience to an order of the commission, made after notice and an opportunity to be heard, and the case of a statute which imposes serious and heavy penalties for its violation, where the validity of the statute depends upon the existence of facts and their effect, which can only be determined after an investigation of a most complicated and technical character. An illustration of the latter case may be found in Ex parte Young, 209 U. S. 123. In that case the legislature of the State of Minnesota
enacted a statute fixing passenger tariffs and commodity rates
131 for railroads, much lower than existing schedules, and sub-
jected the carrier, its agents and employees to serious and heavy penalties for each violation of the statute; and it was held that the statute was unconstitutional, because the penalties for its violation were so enormous that persons affected thereby were prevented from resorting to the courts for the purpose of showing that the tariff schedules provided in the statute would yield so little revenue that their observance would practically confiscate the carrier's property. It will hardly be doubted that a State may impose such penalties as will tend to compel obedience to its mandates. If the penalties are imposed for the violation of an order passed after notice and an opportunity for a hearing, it can not be said that the parties affected have been denied due process of law or the equal protection of the laws.

4. The point is made that the order of the commission is null and void, because it is neither just nor reasonable, in that it undertakes to exact of the defendant unreasonable and unlawful requirements. It is therefore important to ascertain exactly upon what state of facts the order was intended to operate; and in reaching a conclusion upon the matter it is proper to consider the application of the merchants of Adrian in connection with the order of the commission made
thereon. These merchants represented to the commission
132 that the Wadley Southern Railway Company refused to
handle freights delivered to them at Rockledge by the Macon, Dublin and Savannah Railroad Company, without freight charges being fully prepaid to Rockledge; and the commission's

order recited that after investigation the commission found that the alleged unlawful discrimination arose out of the requirement of the Wadley Southern Railway Company that shippers shall prepay charges via Rockledge, before it will receive freight at that point from the Macon, Dublin and Savannah Railroad Company for Adrian, with no requirement of like prepayment of charges on freight via the Central of Georgia Railway Company at Wadley, thus affording facilities to patrons of the Central of Georgia Railway Company's line or route, for the interchange of freight, denied to patrons of the Macon, Dublin and Savannah Railroad Company's line or route; that the Macon, Dublin and Savannah Railroad Company's line or route via Rockledge is a competitor of the Central of Georgia Railway Company's route or line via Wadley for freight moving to Adrian and other points on the Wadley Southern Railway Company between Rockledge and Wadley; that the requirement of the Wadley Southern Railroad Company complained of is intended to afford, and does afford, to patrons of the Central of Georgia Railway Company facilities denied to patrons of the Macon,
Dublin and Savannah Railroad Company, a connecting line
133 of the Wadley Southern Railway Company for Adrian business, which interferes with the exercise of the freedom of choice in routes by shippers; and that the practice complained of is an unlawful discrimination, and such as the commission is required by law to forbid. From these findings of fact it is clearly apparent that the act condemned as an unlawful discrimination was the practice of the Wadley Southern Railway Company to receive from the Central of Georgia Railway Company at Wadley, one of its termini, shipments of freight destined to Adrian without prepayment of freight, and to refuse to receive shipments of freight destined to Adrian from the Macon, Dublin and Savannah Railroad Company at Rockledge, its other terminus, unless the charges were prepaid. The order prohibited the defendant from declining freight shipped over the Macon, Dublin and Savannah Railroad to Adrian, with freight charges to be paid and collected at points of destination, or furnishing different facilities in this matter to the Central of Georgia Railway Company.

Given this construction, does the order exact of the defendant an unreasonable and unlawful requirement? In the original act establishing the railroad commission it was enacted that the commission shall make just and reasonable rules and regulations as may be necessary for preventing unjust discriminations in the transportation of freight and passengers on the railroads of this State.
134 Civil Code, § 2630. The supplementary act of 1907 clothes the commission with the power and authority "to require all common carriers and other public service companies under their supervision to establish and maintain such public service and facilities as may be reasonable and just, either by general rules or by special orders in particular cases." Civil Code, § 2663. The contention is that even under these broad powers it is not competent for the commission to pass the order complained of. It is argued that the commission is not vested with power to force the defendant

into contractual relations with other lines, or to prevent it from selecting those with whom it shall deal on preferential terms or terms of mutual confidence and trust. It is true that railroad companies can not be required to issue through bills of lading, or to contract to forward goods beyond their own lines. Coles v. Central R. Co., 86 Ga. 251 (12 S. E. 749); State v. W. & T. R. Co., 104 Ga. 437 (30 S. E. 891). Neither the purpose nor the effect of this order is to require the defendant to issue a through bill of lading beyond its own line. Nor is its purpose and effect to require any independent contractual relation between the defendant and another carrier. Though the collection of the entire freight
135 charge at destination implies an obligation to account for the connecting carrier's share of it, nevertheless this is but one incident of a course of business voluntarily adopted by the carrier, whereby facilities respecting the interchange of freight *is* afforded to one connecting carrier, and denied to another connecting carrier, in contravention of the statute against unjust discrimination. The imperative quality of the order is to prohibit the defendant from favoring one carrier to the injury of another, and of the public, where conditions as to the service are substantially alike in both cases. It is to prevent a discrimination which practically deprives the merchants of Adrian of any competition in rates and service, because of the defendant's favoritism to the carrier on one end of the line, and the refusal of the same privileges to the carrier at the other end of the line. Where conditions are substantially the same, the denial by a carrier to one of its connections of the same facilities for the interchange of freight accorded to another connecting carrier, and which practically deprives points on its line of the opportunity of competition in service and rates is an unjust discrimination. A. T. & S. R. v. D. & W. O. R., 110 U. S. 667; B. & O. R. Co. v. Adams Ex. Co., 22 Fed. 404; A. & V. Ry. Co. v. Miss. R. Com., 201 U. S. 496; Diamond Mills Co. v. B. & M. R. Co., 9 I. C. C. R. 311. And it is within the power of the commission to make rules and regulations for preventing unjust
136 discriminations in the transportation of freight. Augusta Brokerage Co. v. Cen. of Ga. Ry. Co., 121 Ga. 48 (48 S. E. 714).

A case much in point is that of Logan v. Central R. Co., 74 Ga. 684. The Central Railroad Company operated a road from Savannah to Macon, with branches to other points in the State. It adopted a rule that no shipments of salt or other merchandise from Brunswick in competition with Savannah would be received from local stations on its line, unless charges were prepaid and shipments were delivered by drays as local business. There was another railroad from Brunswick to the interior of the State, from which the Central Railroad refused to receive merchandise unless charges were prepaid and delivered in drays. This court held that this rule of the railroad was in the very teeth of the act of 1874 (Civil Code, §2657), in that it did not "afford the usual and like customary facilities for interchange of freights to patrons of each and all routes or lines alike." And this court also held in Macon, Dublin

and Savannah Railroad Co. v. Graham, 117 Ga. 555 (43 S. E. 1000), that "a common carrier cannot, in this State, lawfully discriminate against one of two or more connecting carriers as to facilities afforded or the charges made touching an interchange of freight."

137 It is contended that section 2657 does not require the affording of facilities of the character required by this order of the commission, but that its requirement is only applicable to physical connections and physical appliances. We do not think the section should be so restricted in its application. It applies to every facility necessary for the safety and convenience of passengers and for the prompt transportation of freight. Besides, the more recent act of 1907 (Civil Code, §2630) confers on the railroad commission the power to require all railroads to maintain such public service and facilities as may be reasonable and just. It does not require argument to prove that a preferential discrimination by a carrier in favor of one of its connections, which has the effect to stifle competition to points on its own line, because the same facilities are not extended to another of its connections under substantially the same conditions, is neither just nor reasonable. At common law common carriers were allowed to discriminate in favor of some of their patrons, so long as the bestowal of favors did not violate their duty to the public. Ocean Steamship Co. v. Savannah Supply Co., 131 Ga. 834 (63 S. E. 577, 20 L. R. A. 867, 265 Am. St. R. 577). But railroad companies of the present day are not only common carriers charged with the performance of their common-law duties as such, but they are also quasi public institutions, and in this relation owe additional duties to the public and are subject to governmental regulation. Certainly a regulation

138 is just and reasonable which requires, not that a carrier shall enter into a specific contract with a connection, but, if it voluntarily extends facilities and privileges to one of its connections, that it must also, under substantially the same conditions, give the same facilities and privileges to the other connections, where the result of its favoritism is the injury of its patrons at intermediate points on its own line.

5. The suit was for a violation of the order of the commission. That order was based on the acts of 1874 and 1907, as has already been pointed out. A suit for a penalty for disobedience to the order of the railroad commission must be brought in the name of the State by direction of the Governor. Civil Code, §2667. As the order of the commission is based on the violation of the acts of 1874 and 1907, the violation of the commission's order is likewise a violation of the statute. The Governor ordered a suit to be instituted in the name of the State for the violation of the commission's order; and even if the second count was necessary, no demurrer to it was interposed, and it is not made to appear that any evidence was received but what was admissible under the first count.

139 6. Objection was made to certain evidence as being irrelevant and immaterial. Granting the objection should have

been sustained, this is not cause for a new trial, where the evidence was not of such character as to prejudice the defendant.

7. Exception is also taken to the refusal of the court to permit a witness to answer a certain question. But as the expected answer is not set out, the assignment of error is insufficient.

8. The court's charge was in substantial accord with the principles of law herein enunciated, and sufficiently comprehensive to cover the real issues in the case; and the evidence authorized the verdict.

Judgment affirmed. All the Justices concur, except Hill, J., not presiding.

140 Supreme Court of Georgia.

ATLANTA, *February* 13, 1912.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

WADLEY SOUTHERN RY. CO.
v.
STATE OF GEORGIA.

This case came before this court upon a writ of error from the superior court of Jefferson county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur, except Hill, J., not presiding.

Bill of costs, $10.00.

Supreme Court of the State of Georgia.

CLERK'S OFFICE, ATLANTA, —— —, ——.

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that —— —— paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON, *Clerk*.

141 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Georgia before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between the Wadley Southern Railway Company, plaintiff

in error, and State of Georgia, defendant in error, wherein was drawn in question the validity of a statute of, or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said plaintiff in error as by its complaint appears; We being willing that error, if any hath been, should be truly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ; so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

142 Witness the Honorable Edward D. White, Chief Justice of the United States, the 2 day of March, in the year of our Lord One Thousand Nine Hundred and Twelve.

[Seal U. S. District Court, N. D. of Georgia.]

O. C. FULLER,
Clerk United States District Court for the Northern District of Georgia.

Allowed by

WM. H. FISH,
Chief Justice of the Supreme Court of Georgia.

March 2, 1912.

Filed in office Mar. 4, 1912.

W. E. TALLEY, *D. C. S. C. Ga.*

143 United States of America to State of Georgia:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Court of Georgia, wherein the Wadley Southern Railway Company, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William H. Fish, Chief Justice of the Supreme Court of Georgia, this 2 day of March, 1912.

WM. H. FISH,
Chief Justice of the Supreme Court of the State of Georgia.

Service acknowledged and copy received of the within citation, this 2 day of March, 1912.

JAMES K. HINES,
Attorney for Railroad Commission of Ga.
JOHN C. HART,
Attorneys for Defendant in Error.

Filed in office Mar. 4, 1912.
W. E. TALLEY, *D. C. S. C. Ga.*

144 In the Supreme Court of Georgia, October Term, 1911.

WADLEY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
versus
STATE OF GEORGIA, Defendant in Error.

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of Georgia.

The petition of Wadley Southern Railway Company by Alexander R. Lawton and T. M. Cunningham, Jr., its attorneys, respectfully shows:

1. That on the 13th day of February, 1911, the Supreme Court of Georgia made and entered a final judgment herein in favor of the defendants in error, the State of Georgia, and against the plaintiff in error, the Wadley Southern Railway Company, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this petitioner, Wadley Southern Railway Company, all of which more in detail appear from the Assignment of Errors which is filed with this petition.

2. In this suit there was drawn in question the validity of a statute of and authority exercised under the State of Georgia on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; and, in said suit Wadley Southern Railway Company specially set up and claimed a title, right, privilege and

145 immunity under the Constitution of the United States, and the decision was against the title, right, privilege and immunity specially set up and claimed under the Constitution, and petitioner alleges that therein a manifest error has happened, to the prejudice of Petitioner.

3. The said Supreme Court of Georgia is the highest court of the State of Georgia in which a decision in this suit and in this matter could be had.

Wherefore, petitioner prays that a writ of error may issue in this behalf from the Supreme Court of the United States to the Supreme Court of Georgia for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

This March 2, 1912.

ALEXANDER R. LAWTON,
T. M. CUNNINGHAM, JR.,
Attorneys for Petitioner.

Filed in office March 4, 1912.

W. E. TALLEY,
D. C. S. C. Ga.

146 In the Supreme Court of Georgia, October Term, 1911.

WADLEY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
versus.
STATE OF GEORGIA, Defendant in Error.

This 2d day of March, 1812, came the plaintiff in error, Wadley Southern Railway Company, by its Attorneys, and filed herein and presented to this court its petition, praying for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of Georgia intended to be urged by it; praying also that a transcript of the record and proceedings, and the papers upon which the judgment herein was rendered, duly authenticated, might be sent to the Supreme Court of the United States, and that such other proceedings might be had as may be proper in the premises.

On consideration whereof this court, being the court rendering the judgment and passing the decree complained of, and the undersigned as Chief Justice of said court, do hereby allow the Writ of Error upon the plaintiff giving the bond required by law, in the sum of Two Thousand Dollars.

In witness whereof this order allowing said Writ of Error is signed by William H. Fish, Chief Justice of the Supreme
147 Court of Georgia, this 2d day of March, 1912.

WM. H. FISH,
Chief Justice of the Supreme Court of the State of Georgia.

Filed in office March 4, 1912.

W. E. TALLEY, *D. C. S. C. Ga.*

148 In the Supreme Court of the State of Georgia, October Term, 1911.

WADLEY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
versus
STATE OF GEORGIA, Defendant in Error.

Assignment of Errors.

Wadley Southern Railway Company, in connection with its petition in the above stated cause for a writ of Error, makes the following assignments of error, which it avers occurred upon the trial of the cause and in the judgment of the Supreme Court of Georgia.

The plaintiff in error, the Wadley Southern Railway Company, assigning error says:

That in the record and proceedings in the aforesaid cause, and in the judgment of the Supreme Court of Georgia, there is manifest error in this:

First. The Supreme Court of Georgia erred in affirming the judgment of the court below, towit, the Superior Court of Jefferson County, Georgia, being a judgment in favor of the State of Georgia against the Wadley Southern Railway Company for a penalty for a violation of an order of the Railroad Commission of Georgia, and in refusing to reverse said judgment and grant a new trial, be-

149 cause said judgment denies to the plaintiff equal protection of the laws, and takes its property without due process of law, contrary to the 14th Amendment to the Constitution of the United States.

Second. The Supreme Court of Georgia erred in not holding that portion of the Georgia statute, which prescribed penalties and punishments for violation of an order of the Railroad Commission, contained in sections 2667 and 2668 of the Code of Georgia of 1910, repugnant to the 14th Amendment of the Constitution of the United States, as being a denial of due process and of equal protection of law, in that the penalties which are permitted to be imposed by the statute are so enormous and grossly excessive as if constitutional that they would effectually prevent any inquiry into the validity or reasonableness of any order of the Commission.

Third. The Supreme Court of Georgia erred in not holding the order of the Railroad Commission repugnant to the 14th Amendment to the Constitution of the United States as being a denial of due process of law and of equal protection of law; and erred in so construing and applying the statutes of Georgia, under the authority of which the said order of the Railroad Commission was promulgated, as to deny to plaintiff in error due process of law and equal protection of law, contrary to the 14th Amendment to the Constitution of the United States.

150 (1) Because the order of the Commission in substance and effect forces plaintiff in error to enter into a contract with the Macon, Dublin and Savannah Railroad Company, which it does not

desire to make, which it is against its interest to make, and which it can not be compelled to make.

(2) Because when plaintiff in error entered into a contract with the Central of Georgia Railway Company, for an exchange of business between them at Wadley, it did not do so at the peril of being compelled to enter into a similar contract with other railroads at other points, and neither the Railroad Commission nor the Supreme Court of Georgia can deprive plaintiff in error of its property, or deny it equal protection of the law, by the expedient of pronouncing such a state of facts an unjust discrimination; nor by pronouncing the conditions under which plaintiff in error exchanges business with the Central of Georgia Railway Company at Wadley as substantially similar with the conditions at Rockledge, when in point of fact they are entirely dissimilar.

(3) Because if the incidental effect of the arrangement between the plaintiff in error and the Central of Georgia Railway Company, for the exchange of business at Wadley is to make shippers to Adrian prefer the route via Wadley, this fact can not be made the occasion for compelling the plaintiff in error to enter into a similar
151 contract with the Macon, Dublin and Savannah Railroad Company at Rockledge on the theory that it is an unjust discrimination against the Macon, Dublin and Savannah Railroad Company, and plaintiff in error can not be compelled to give up the advantage which it has by hauling through business via Wadley, and be compelled to enter into a contract with the Macon, Dublin and Savannah Railroad Company, which will give the latter the privilege and opportunity of depriving plaintiff in error of the larger and more profitable haul over its line to Adrian via Wadley.

Wherefore, the said Wadley Southern Railway Company, plaintiff in error, herein prays that the judgment of the Supreme Court of the State of Georgia in favor of the defendant, State of Georgia, and against the plaintiff, Wadley Southern Railway Company, may be reversed.

ALEXANDER R. LAWTON,
T. M. CUNNINGHAM, JR.,
Attorneys for Petitioner.

Filed in office March 4, 1912.
W. E. TALLEY, *D. C. S. C., Ga.*

152 In the Supreme Court of the United States.

WADLEY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
versus
STATE OF GEORGIA, Defendant in Error.

Error from Supreme Court of Georgia.

Know all men by these presents That Wadley Southern Railway Company, and American Surety Company of New York, as Surety, are held and firmly bound unto the State of Georgia in the sum of

Two Thousand Dollars ($2,000.00), to be paid to the said State of Georgia, for which payment well and truly to be made we bind ourselves and each of us jointly and severally and each of our successors and assigns firmly by these presents.

Sealed with our seals and dated this First day of March, 1912.

Whereas, the above named Wadley Southern Railway Company has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the Supreme Court of Georgia:

Now, therefore, the condition of this obligation is such that if the above named Wadley Southern Railway Company shall prosecute the said writ of error to effect and answer all damages and costs should it fail to make good its plea, then this obligation to be void, otherwise to remain in full force and virtue.

153 WADLEY SOUTHERN RAILWAY COMPANY,
By W. A. WINBURN, *President.*

Attest.

[SEAL.] J. G. CORBETT, *Secretary.*

Signed and sealed by Wadley Southern Railway Company, in Chatham County, Georgia, in presence of:

E. B. McCUEN.

[SEAL.] T. F. SMITH,
Notary Public, Chatham County, Georgia.

AMERICAN SURETY COMPANY OF NEW YORK,
By HORACE A. CRANE, *Res. V.-President.*

Attest:

DAVID C. BARROW, [SEAL.]
Resident Assistant Secretary.

Signed and sealed by American Surety Company of New York, in Chatham County, Georgia, in presence of:

JOS. M. DREYER.

[SEAL.] JOSEPH J. GLEASON,
Notary Public, Chatham Co., Ga.

Approved this 2 day of March, 1912.

WM. H. FISH,
Chief Justice Supreme Court of Georgia.

Filed in office March 4, 1912.

W. E. TALLEY, *D. C. S. C., Ga.*

154 Clerk's Office of the Supreme Court of Georgia.

ATLANTA, *March* 22, 1912.

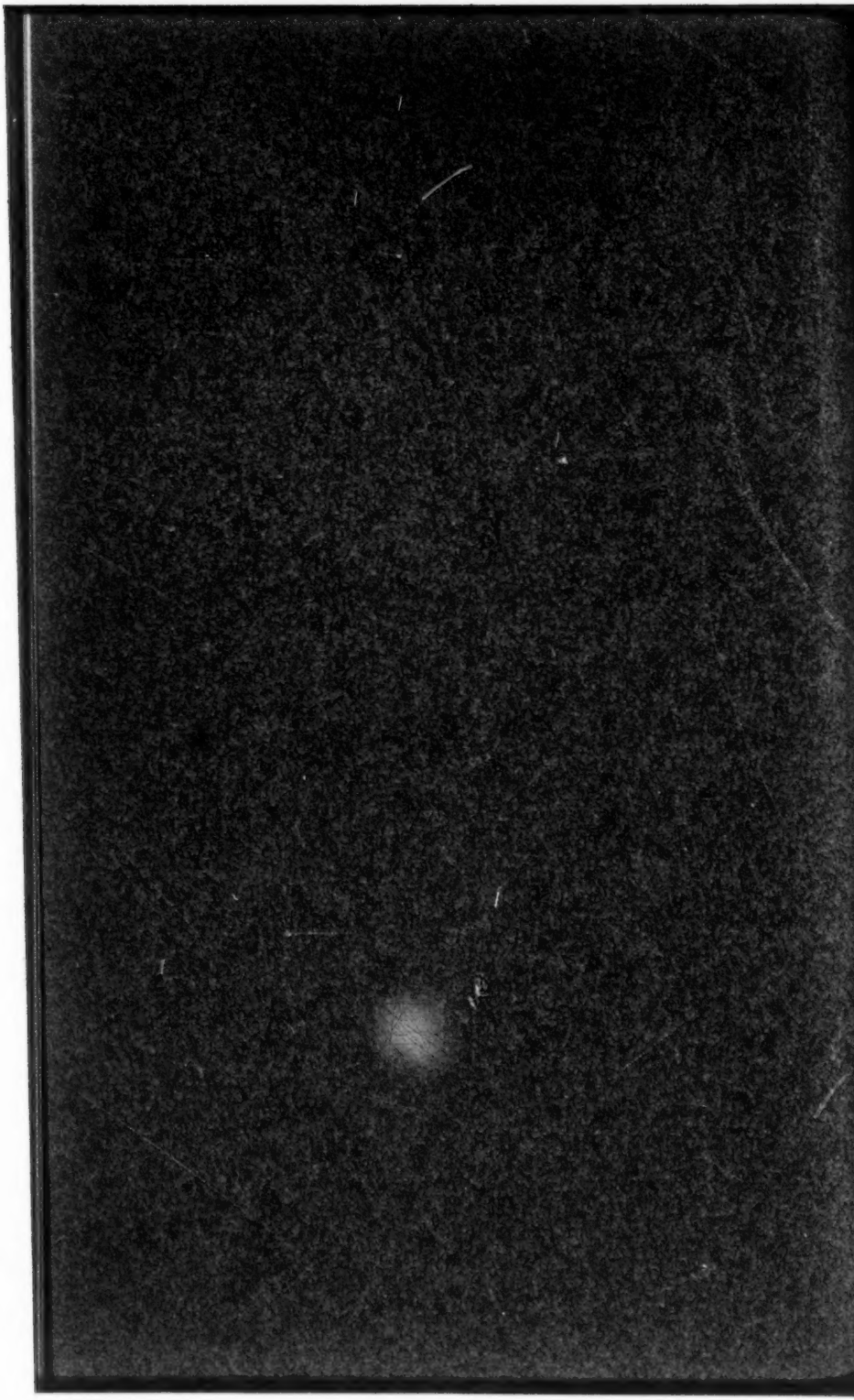
I here*to* certify that the foregoing pages hereto attached contain the original writ of error, citation and acknowledgment of service, together with true and complete copies of the petition for the writ of error, bond and assignments of errors, and of the entire record and proceedings in the Supreme Court of Georgia, as appears from the records and files of this office, in the case of Wadley Southern Railway Company, Pl'ff in Error, v. The State of Georgia, Def't in Error, all of which are transmitted to the Supreme Court of the United States by virtue of said writ of error.

Witness my signature and the seal of said court hereto affixed the day and year above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON,
Clerk Supreme Court of Georgia.

Endorsed on cover: File No. 23,137. Georgia Supreme Court. Term No. 223. Wadley Southern Railway Company, plaintiff in error, vs. The State of Georgia. Filed March 29th, 1912. File No. 23,137.



SUBJECT INDEX.

Cases Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 223.

WADLEY SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF GEORGIA, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

Wadley Southern Railway Company has a line running from Wadley to Rockledge, a distance of 37 miles. It connects at Wadley with Central of Georgia Railway Company, which has a line running from Macon to Savannah, and connects at Rockledge with the Macon, Dublin & Savannah Railroad, which has a line running from Macon towards Savannah. Adrian is situated on the line of the Wadley Southern, distance 27 miles from Wadley and 10 miles from Rockledge. The Central of Georgia Railway Co. owns all the stock and bonds of the Wadley Southern Railway, but

the two railroads are operated separately. It is to the interest of the Wadley Southern that freight from Macon or Savannah and points beyond should move to Adrian via the Wadley junction, rather than via the Rockledge junction, because through the Wadley junction it gets a haul of 27 miles, and through the Rockledge junction a haul of only 10 miles, and, moreover, the Central allows it a greater proportion out of the through rate than its mileage proportion, while the Macon, Dublin & Savannah allows it only its mileage proportion on through freights moving through Rockledge. Under these conditions the Wadley Southern refused to advance to the M., D. & S. Railroad the freight charges accrued up to Rockledge on shipments destined to Adrian and moving via the Macon, Dublin & Savannah, but it does advance to the Central Railroad freight charges accrued up to Wadley on shipments destined to Adrian and moving via the Central Railroad.

The Railroad Commission of Georgia passed an order, March 11, 1910, reciting in substance that it appearing that the Wadley Southern required all shippers to Adrian via the Rockledge route to prepay freight charges, but that it does not require the like prepayment on shipments via the Wadley route, that such a practice was a discrimination against the patrons of the route via the Macon, Dublin & Savannah, and in favor of the patrons of the route via Central of Georgia Railway Company, and thereupon the Wadley Southern was ordered to desist from the alleged discrimination.

On May 26, 1910, the State of Georgia brought a suit against the Wadley Southern Railway Company for a penalty for a violation of the above-recited order. On the trial of the action the jury found a verdict against the defendant, and the trial judge imposed a fine of $1,000.00, and on a writ of error to the Supreme Court of Georgia the judgment of the lower court was affirmed.

The case is here upon a writ of error to the judgment of the Supreme Court of the State of Georgia.

On the trial of the action, the defendant denied the allegation that it had exacted the prepayment of freight charges on shipments via Rockledge, and particularly that it had made such an exaction of the patrons of the route via Rockledge. The uncontrovertible fact is that the Wadley Southern did not require the prepayment of freight from Rockledge to Adrian, nor did it require anything of the patrons of the route via Rockledge. The sole and only thing it did refuse to do was to either advance to the Macon, Dublin & Savannah the freight charges which accrued on the movement up to Rockledge, or to collect such charges out of the consignee at Adrian for the account of the Macon, Dublin & Savannah. The Wadley Southern did not refuse to receive freight at Rockledge from the Macon, Dublin & Savannah, either in carload lots or otherwise, nor did it require the patrons of the Macon, Dublin & Savannah to prepay the freight; it simply declined to take the freight at Rockledge, and either pay to the Macon, Dublin & Savannah the freight charges which the M., D. & S. had earned up to Rockledge, or to take the freight at Rockledge and collect at destination the freight earned by the M., D. & S. up to Rockledge. There is no real dispute in the evidence as to the actual fact. The only dispute is as to the designation of it. The defendant in error claims that it was a requirement that the shippers by the M., D. & S. route should prepay freight; we maintain that it was a refusal to advance to the M., D. & S. its earned freight up to Rockledge. The question, after all, is not one of substance, and it makes no substantial difference how it may be regarded on the issues presented by the assignment of errors.

The rates are precisely the same to Adrian on freight from Macon or Savannah and beyond, whether it moves through the Rockledge junction or Wadley junction, so that it makes no difference to persons residing at Adrian whether freight moves through the one junction or the other.

Assignment of Errors.

First. The Supreme Court of Georgia erred in affirming the judgment of the court below, to-wit, the Superior Court of Jefferson County, Georgia, being a judgment in favor of the State of Georgia against the Wadley Southern Railway Company for a penalty for a violation of an order of the Railroad Commission of Georgia, and in refusing to reverse said jugdment and grant a new trial, because said judgment denies to the plaintiff equal protection of the laws, and takes its property without due process of law, contrary to the 14th Amendment to the Constitution of the United States.

Second. The Supreme Court of Georgia erred in not holding that portion of the Georgia statute which prescribed penalties and punishments for violation of an order of the Railroad Commission, contained in sections 2667 and 2668 of the Code of Georgia of 1910, repugnant to the 14th Amendment of the Constitution of the United States, as being a denial of due process and of equal protection of law, in that the penalties which are permitted to be imposed by the statute are so enormous and grossly excessive as if constitutional that they would effectually prevent any inquiry into the validity or reasonableness of any order of the Commission.

Third. The Supreme Court of Georgia erred in not holding the order of the Railroad Commission repugnant to the 14th Amendment to the Constitution of the United States, as being a denial of due process of law and of equal protection of law, and erred in so construing and applying the statutes of Georgia, under the authority of which the said order of the Railroad Commission was promulgated, as to deny to plaintiff in error due process of law and equal protection of law, contrary to the 14th Amendment to the Constitution of the United States.

(1) Because the order of the Commission in substance and effect forces plaintiff in error to enter into a contract

with the Macon, Dublin and Savannah Railroad Company, which it does not desire to make, which it is against its interest to make, and which it cannot be compelled to make.

(2) Because when plaintiff in error entered into a contract with the Central of Georgia Railway Company for an exchange of business between them at Wadley, it did not do so at the peril of being compelled to enter into a similar contract with other railroads at other points, and neither the Railroad Commission nor the Supreme Court of Georgia can deprive plaintiff in error of its property, or deny it equal protection of the law, by the expedient of pronouncing such a state of facts an unjust discrimination, nor by pronouncing the conditions under which plaintiff in error exchanges business with the Central of Georgia Railway Company at Wadley as substantially similar with the conditions at Rockledge, when in point of fact they are entirely dissimilar.

(3) Because if the incidental effect of the arrangement between the plaintiff in error and the Central of Georgia Railway Company for the exchange of business at Wadley is to make shippers to Adrian prefer the route via Wadley, this fact cannot be made the occasion for compelling the plaintiff in error to enter into a similar contract with the Macon, Dublin and Savannah Railroad Company at Rockledge, on the theory that it is an unjust discrimination against the Macon, Dublin and Savannah Railroad Company, and plaintiff in error cannot be compelled to give up the advantage which it has by hauling through business via Wadley, and be compelled to enter into a contract with the Macon, Dublin and Savannah Railroad Company which will give the latter the privilege and opportunity of depriving plaintiff in error of the larger and more profitable haul over its line to Adrian via Wadley.

I.

The statutes of the State of Georgia which impose the penalties and punishments for violation of an order of the Railroad Commission are contrary to the 14th Amendment of the Constitution of the United States, as being a denial of due process of law and equal protection of law.

The penalties are prescribed by Code, sections 2667, 2668, and 2669 of the Code of Georgia of 1911, which are codifications of an act passed in 1907 (see Appendix). It is provided that every common carrier which shall violate an order of the Commission "shall forfeit to the State of Georgia a sum not more than five thousand dollars for each and every offense, the amount to be fixed by the presiding judge." Every violation of the order "shall be a separate and distinct offense, and, in case of a continued violation, every day a violation thereof takes place shall be deemed a separate and distinct offense." In addition, every officer, agent, or employee who disobeys the order, or aids or abets the disobedience of the order, shall be guilty of a misdemeanor. The corporation and its agents can be proceeded against in any county of the State through which the railroad runs.

This question has been set at rest by two decisions of this court:

Ex parte Young, 209 U. S., 163.
Wilcox *vs.* Consolidated Gas Co., 212 U. S., 53.

The action which the State of Georgia brought to recover the penalties in this case was only for one penalty of "not to exceed the sum of $5,000.00, to be fixed by the presiding judge" (see Record, p. 8). The State studiously avoided bringing an action for each offense or for every day the violation continued. And the Supreme Court of Georgia in its opinion (Record, p. 60) did not refer to the fact that the

statute provided for a penalty for each offense and for every day the offense continued. This is in substance a confession that the penalties prescribed were shocking to the sense of the officials of the State who were charged with the enforcement of the statute. Neither was any prosecution instituted against the officers or agents of the railway company.

The constitutionality of a statute is to be determined not according to the grace or favor of the officials who act under it, but according to terms of the statute itself.

Security Trust Co. *vs.* Lexington, 203 U. S., 323.
Georgia Railway *vs.* Wright, 207 U. S., 127, 138.
Roller *vs.* Holly, 176 U. S., 409.

The Supreme Court of Georgia seeks to distinguish this case from the decision of *Ex parte* Young (*supra*), as follows (Record, p. 59):

> "The distinction is obvious between a case where the statute imposes a penalty for disobedience to an order of the commission, made after notice and an opportunity to be heard, and the case of a statute which imposes serious and heavy penalties for its violation, where the validity of the statute depends upon the existence of facts and their effect, which can only be determined after an investigation of a most complicated and technical character. An illustration of the latter case may be found in *Ex parte* Young, 209 U. S., 123."

The Supreme Court of Georgia in this case decided that the statutes of the State of Georgia provided for notice and an opportunity to the railway company to be heard before the Commission. But the order which the Commission passed was not conclusive. It was subject to judicial review. The judical question was twofold: First, was the order itself just and reasonable, and was it constitutional? The order was *prima facie* correct. So were the rate statutes of the State of Minnesota attacked in the Young case. The

fact that the railway company had an opportunity to be heard before the Commission is a curious reason to urge in favor of the constitutionality of the penalties prescribed for the violation of the order after it was passed. If the order had never been passed there would have been no penalties. The railway company was as uncertain as to the validity of the order of the Railroad Commission in this case as the railway companies were as to the validity of the rate acts of the Minnesota legislature in the Young case. If the plaintiff in error loses this case, it will lose its railroad if the penalty provisions of the statutes of the State of Georgia are enforced; the only thing that can save us is the grace and favor of the officials of the State, whose mercy is in striking contrast to the savage penalties of the statutes.

II.

The order of the Railroad Commission is contrary to the 14th Amendment of the Constitution of the United States, in that it is an arbitrary and unreasonable exercise of the police power of the State and beyond the same, and in substance and effect deprives the plaintiff in error of its property without due process of law and denies it the equal protection of law.

1. *Facts Reviewable by This Court.*

The Supreme Court of Georgia has decided that this order of the Railroad Commission is within the powers conferred upon it by the statutes of the State of Georgia, and we take it that the railway company is concluded by the decision on this subject. But the decision goes further, and holds that the order of the Commission was just and reasonable, and that the act of the railway company prohibited by the order was an unlawful discrimination. These latter questions, we take it, are reviewable by this court, and, in fact, lie at the

bottom of the question of the constitutionality of the order. If the act prohibited by the order of the Commission was an unlawful discrimination, or if the order of the Commission is just and reasonable, the order is then constitutional; but because the Supreme Court of Georgia has said so, we are not concluded on a writ of error which challenges the correctness of the decision on the very questions which are determinative of the constitutionality of the order.

> "That being so, it leaves for consideration that as a matter of law the order, on the facts proved, was so unreasonable as to amount to a taking of property without due process of law. This necessitates an examination of the evidence not for the purpose of passing on conflicts in the testimony or of deciding upon pure questions of fact, but, as said in Kansas City Railway Co. *vs.* Albers Commission Company, 223 U. S., 573, 591, from an inspection of the 'entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter.' * * * Here the question presented is whether as matter of law the facts proved show the existence of such a public necessity as authorizes a taking of property."
>
> Oregon Ry. & M. Co. *vs.* Fairchild, 224 U. S., 510, 528.

> "While it is conceded that ordinarily, upon writ of error to a State court, this court does not review the findings of fact, yet it is insisted that in this case a Federal right has been denied as the result of a finding of fact which is without support in the evidence; that the evidence is before us by which that insistence may be tested. * * * The insistence as to the power and duty of this court in such a case is well founded."
>
> Southern Pacific Co. *vs.* Schuyler, 227 U. S., 601, 611, and cases cited.

2. *The Case is Not One of Unjust Discrimination.*

The Wadley Southern has not denied to the patrons of the Macon, Dublin and Savannah route any right or privilege which they could lawfully demand. If the Wadley Southern agrees with its connection, the Central of Georgia Railroad, to advance the freight earned by the latter up to Wadley that does not compel it to do the same thing for the Macon, Dublin and Savannah at Rockledge. The Wadley Southern prefers to do business with its connection at Wadley, and it has a lawful right to do so. It is to its manifest business interest. The shippers via the Rockledge junction have no vested right to have the freight moved on credit. The arrangement between the Wadley Southern and the Central at Wadley is the result of a contract between them. The order of the Railroad Commission in substance and effect compels the Wadley Southern to enter into the same contract with the Macon, Dublin and Savannah. The route through Wadley is competing with the route through Rockledge. Can the Commission compel them to cease and desist from the competition? Shippers by the Wadley junction are given the *privilege* of credit by this route. Can the Wadley Southern be lawfully compelled to establish another route which will greatly diminish its business? The Supreme Court of Georgia speaks (Record, p. 62) of a preferential discrimination by a carrier in favor of one of its connections, which has the "effect to stifle competition to points on its own line." It seems to us that if the so-called preferential discrimination is withdrawn there will be no more competition. The Supreme Court of Georgia speaks in two places in its opinion (Record, pp. 54-61) of destruction of competition in rates. There is no such case here. The rates are identically the same, no matter which junction the shipper uses. The shipper is not prohibited or prevented from using either route. If the shipper elects to ship via Rockledge he will have to prepay his freight, unless the

M., D. & S. will credit him. The Wadley Southern does not *interfere* with the patrons of the Macon, Dublin & Savannah. It simply says to the M., D. & S. that it will not advance its freight charges earned up to Rockledge or act as its collection agent at destination.

A carrier may discriminate between shippers by giving credit to one and refusing it to the other. It may demand prepayment of charges on one commodity or at one station and not on other commodities or at other stations. Says the U. S. Circuit Court of Appeals, speaking through Judge Sanborn:

> "The defendant had the right under the common law to demand prepayment of its charges of the plaintiff and to grant credit to others for similar charges. It had the same right in this regard that every merchant, every man, and every corporation has to grant credit to one or to all but one, and to refuse it to others or to him. There was nothing unjust or morally wrong in the exercise of this right, because the plaintiff had no moral right to the extension of credit, and justice did not require that defendant should grant to the plaintiff the same credit that it extended to others.
>
> "*The Interstate Commerce Act did not expressly deprive the defendant of this right or make its exercise unlawful;* so far as its express provisions are concerned, it left the right and its exercise among those which the Supreme Court declared that carriers were free to exercise and to manage upon 'the same principles which are regarded as sound and adopted in other trades and pursuits.'
>
> "The refusal to extend credit to a purchaser of goods, or of transportation, of financial responsibility, credit, and reputation equal to those of others to whom such credit is extended does not in the nature of things subject him to an undue or unreasonable prejudice or disadvantage, while a requirement that such a vendor shall extend equal credit, to all purchasers of equal financial responsibility, credit, and reputation, would subject him to unreasonable and undue disadvantage. Reason, sound business prin-

ciples, and the practice of the business world give the option to extend credit to the seller of his property, or his services, and to the loaner of his money, and not to the purchaser or borrower. There are other considerations besides financial responsibility, credit, and reputation, which condition the rational extension of credit."

Gamble-Robinson Co. *vs.* C. & N. W. Ry., 168 Fed., 161.

"A railroad company is not required by the Interstate Commerce Act, sec. 3, cl. 2, to furnish to competing connecting carriers equal facilities for the interchange of traffic, when this involves the use of its tracks by such carriers, and it may still permit such use by one carrier to the entire exclusion of the others.

"Nor is a connecting road which permits through billing and routing with one forwarding road obliged to do likewise with another forwarding road, although the latter possesses all the necessary tracks and terminal facilities; and it may still insist on carrying all freight offered by such road in its own cars, and to that end require reloading and rebilling at local rates.

"Nor does the fact that a connecting road carries freight offered by some forwarding roads without prepayment of its charges oblige it to do likewise with freight offered by other forwarding roads."

Little Rock & M. R. Co. *vs.* St. Louis, I. M. & S. Ry., 59 Fed., 400.

"An interstate carrier does not subject another carrier to an 'undue or unreasonable disadvantage' (Interstate Commerce Act, sec. 3, cl. 2), by exacting the prepayment of freight on all property received from it at a given station, although it does not require charges to be paid in advance on freight received from other individuals and competing carriers at such station. 50 Fed., 400, affirmed.

"An interstate carrier which enters into an arrangement with a connecting carrier for through billing, rating, and loading, and for the use of its tracks and terminals, is not obliged to make the same arrangement with other connecting carriers, though the

physical facilities for an interchange of traffic are the same. 59 Fed., 400, affirmed."

Same case affirmed by Circuit Court of Appeals, 63 Fed., 775.

"A common carrier engaged in interstate commerce may at common law, and under the interstate commerce law, demand prepayment of freight charges, when delivered to it by one connecting carrier, without exacting such prepayment when delivered by another connecting carrier, and may advance freight charges to one connecting carrier without advancing such charges to another connecting carrier.

"Such carrier may enter into a contract with one connecting carrier for through transportation, through joint traffic, through billing, and for the division of through rates, without being obliged to enter into a similar contract with another connecting carrier."

Gulf, C. & S. F. Ry. Co. *vs.* Miami S. S. Co., 86 Fed., 407.

"Under Code N. C., sec. 1963, providing that common carriers may require prepayment of freight in all cases, a railroad company may lawfully refuse to receive freight offered by a connecting railway company without prepayment, though it does not demand prepayment of others, if the connecting railroad has notice that prepayment is required.

"In an action for damages for refusal to receive from a connecting line without prepayment freight billed to a certain flag station, defendant may show that it had a fixed regulation requiring prepayment on all freight consigned to that station, and that both plaintiff and the connecting line knew of that fact."

Randall *vs.* Richmond & D. R. Co., 108 N. C., 612; 13 S. E. Rep., 137.

"In the absence of any regulation by law or custom, a railway company receiving freight from a connecting line is not required to advance or assume payment of the charges due thereon for transportation from the point of origin to the point of connection.

"In the absence of any arrangement between connecting railway companies, there is no obligation on the part of either to honor passenger tickets issued by the other."

Oregon Short Line *vs.* Northern Pac., 51 Fed., 465.

Says the court in the above case:

"The practice of railway companies operating connecting lines to honor tickets or coupons for passage over their respective lines issued by a connecting company, which is very general, is *founded entirely upon arrangements* between the connecting companies. In the absence of such arrangements, there is no obligation on the part of either company to honor tickets issued by the other. All the witnesses examined on this point concur in their statements in this respect."

"The provision of the interstate commerce law forbidding discrimination against any locality or description of traffic (24 Sta., 380, sec. 3, cl. 1) is for the protection of the locality or traffic itself, and cannot be invoked by a carrier as against a connecting carrier which discriminates, in the matter of requiring prepayment of freight and car mileage, between goods which come from different sections of the country over the line of the complaining carrier. 51 Fed., 465, affirmed.

"The provision requiring carriers to afford all reasonable, proper, and equal facilities for interchange of traffic, and forbidding discrimination between connecting lines (section 3, cl. 2), is not violated by receiving and forwarding, without prepayment of freight or car mileage, cars of other companies containing goods coming from one locality and refusing to do so, unless prepayment is made when the goods are from a different locality. 51 Fed., 465, affirmed."

Same case affirmed by Circuit Court of Appeals, 61 Fed., 158.

The Supreme Court of Georgia has decided that a railroad company cannot be required to issue a through bill of lading beyond the terminus of its own line. The court said, page 255:

> "A corporation may voluntarily make a contract of this sort, but there is no law that we know of which compels it to make one against its wishes. And speaking for myself I doubt very much the power of the legislature to enact a law compelling a railroad to make a contract for a through bill of lading beyond its terminus."
>
> Coles *vs.* Central R. R. Co., 86 Ga., 251, 255.

The Supreme Court of Georgia again decided that the Wrightsville and Tennille Railroad could not be compelled to issue a through bill of lading over its connection the Augusta Southern, although it did issue through bills of lading over its connection the Central Railroad. The Augusta Southern and the Central both connect with the Wrightsville and Tennille at Tennille. This was held not to be unjust discrimination.

State of Georgia *vs.* W. & T. R. R., 104 Ga., 437.

The Supreme Court of the State of Georgia seeks to avoid the force of the two cases cited above as follows (Record, p. 61):

> "Neither the purpose nor the effect of this order is to require the defendant to issue a through bill of lading beyond its own line. Nor is its purpose and effect to require any independent contractual relation between the defendant and another carrier. Though the collection of the entire freight charge at destination implies an obligation to account for the connecting carriers' share of it, nevertheless this is but one incident of a course of business voluntarily adopted by the carrier whereby facilities respecting the interchange of freight is afforded to one connecting carrier and denied to another connecting carrier in contravention of the statute against unjust discrimination."

It seems to us that the logic of the decision is wrong. If it is not an unjust discrimination to refuse to route freight over one connecting carrier and to route freight under the same conditions over another connecting carrier, it is surely not an unjust discrimination to refuse to act as a fiduciary agent of one connection and to act in such capacity for another. The collection of freight charges at destination for account of a connecting carrier or the advancing freight charges at the junction point is as much the result of a contract as the issue of a through bill of lading. The advancing of charges or the collection of them implies a use of facilities, and in the very nature of things must proceed from a contract, express or implied.

The Supreme Court of Georgia in its decision treats the case as one of discrimination *under substantially the same conditions*. The conditions are totally dissimilar.

The Central and the Wadley Southern exchange a large amount of freight at Wadley. The interest of the Central in the Wadley Southern is such that the Central naturally would give it all the freight it could and the relations are such between the two that the Wadley Southern would naturally prefer the Central. The revenue of the Wadley Southern is more than twice as great on freight to Adrian, which moves via Wadley, than on the same freight if it moved by Rockledge. That seems to us to make the conditions at Rockledge and Wadley on freight destined to Adrian totally dissimilar. This case only relates to freight to Adrian and to no other point.

Mr. Justice Evans, who wrote the opinion in this case, said, in the case below, speaking of an alleged discrimination against a shipper: "The railway company acted as the average business man would have done; that is all. In declining to grant the privilege which the brokerage company wished to enjoy, the railway company merely adopted a policy which was within its rights as a carrier.

Central R. R. *vs.* Augusta Brokerage Co., 122 Ga., 646, 650.

The case of Logan *vs.* Central R. R., 74 Ga., 684, which is cited by the Supreme Court of Georgia (Record, p. 61) as fortifying the court in its conclusion and as being very much in point, seems to us to be very much unlike this case. In the case cited the Central Railroad refused to receive at Macon car-loads of salt shipped over the line of the East Tennessee road from Brunswick and destined to a local point on the line of the Central, and required the freight to be drayed across the city from one depot to the other and required the freight charges to be prepaid from Macon to destination. This was done in order to force shipments of salt through the port of Savannah, to which the Central had a line of railroad while it had no line to Brunswick.

3. *Applicable cases of Supreme Court of the United States on the 14th Amendment.*

The power has been denied to a State to compel a railroad company to put in switches at its own expense on the application of the owners of any elevator erected within a specified limit. It being held:

> "There are constitutional limits to what can be required of the owners of railroads under the police power. Requiring the expenditure of money takes property whatever may be the ultimate return for the outlay."
>
> Missouri Pac. Ry. *vs.* State of Nebraska, 217 U. S., 196.

> "An order of a railroad commission requiring a railroad company to expend money and use its property in a specified manner is not a mere administrative order but is a taking of property. A State acting through an administrative body may require railroad companies to make track connections (Wisconsin, etc., R. R. Co. *vs.* Jacobson, 179 U. S., 287), but such body cannot compel a company to build branch lines, connect roads lying at a dis-

tance from each other, or make connections at every point regardless of necessity; each case depends on the special circumstances involved. While the statute of Washington authorizing the State Railroad Commission to order additional trackage is not unconstitutional as denying due process of law, the orders in this case were not justified by public necessity and therefore deprived the railroad company of its property without due process of law."

Oregon Ry. & N. Co. *vs.* Fairchild, 224 U. S., 510.

"A statute of a State by which as construed by the Supreme Court of the State, a board of transportation is authorized to require a railroad corporation which has permitted the erection of two elevators by private persons on its right of way at a station to grant upon like terms and conditions a location upon that right of way to other private persons in the neighborhood, for the purpose of erecting thereon a third elevator, in which to store grain from time to time, is a taking of private property of the railroad corporation for a private use in violation of the fourteenth article of amendment of the Constitution of the United States."

Missouri Pac. Ry. *vs.* Nebraska, 164 U. S., 403.

"The duty of a carrier to accept goods tendered at its station does not require it to accept cars offered by competing roads at arbitrary points near its terminus for the purpose of using its terminal station. A law requiring the carrier so to do is unconstitutional as taking property without due process of law."

Louisville & Nashville R. R. *vs.* Central Stock Yards, 212 U. S., 132.

See also Central Stock Yards *vs.* L. & N. R. R., 192 U. S., 568.

The denial of due process of law and the taking of property in this case consists of compelling the Wadley Southern to act in a fiduciary capacity and as a collecting agent for the Macon, Dublin & Savannah, or compelling the Wadley

Southern to advance the charges of the M., D. & S. This gives to the M., D. & S. the facilities of the Wadley Southern at Adrian and compels its clerks, which it pays, to work in the interest of the M., D. & S. and against the interest of the Wadley Southern; or, if the charges are advanced, it takes money out of the pocket of the Wadley Southern to pay the M., D. & S. the latter's freight charges. This is a direct and substantial taking of property.

The order of the Railroad Commission cannot be justified under the guise of the police power. It subserves no real public interest.

The decision of the Supreme Court of Georgia that the order is directed at a case of unjust discrimination, when, in point of fact, there is no unlawful or unjust discrimination, and when, in point of fact, the conditions are totally dissimilar, cannot save the order, and this court will look to the facts in the case and decide for itself whether, first, it is a case of unjust and unlawful discrimination, and whether, under the facts and circumstances of the case, the order is a valid exercise of the police power of the State of Georgia.

Respectfully submitted,

A. R. LAWTON,
T. M. CUNNINGHAM, JR.,
For Plaintiff in Error.

APPENDIX.

Extracts from Code of Georgia.

SEC. 2667. *Penalties; proceedings to recover.*—Every common carrier, railroad, street railroad, railroad corporation, street-railroad corporation, express, telephone, telegraph, dock, wharfage, and terminal company or corporation within the State and other corporations, companies, or persons coming under the provisions of this section, and all officers, agents, and employees of the same, shall obey, observe, and comply with every order made by the commission under authority of law. Any common carrier, railroad, street railroad, railroad corporation, street-railroad corporation, express, telephone, telegraph, dock, wharfage, or terminal company or corporation, cotton compress company within this State, and other corporations, companies, or persons coming under the provisions of this section, which shall violate any provision of this section or the acts heretofore passed, or which fails, omits, or neglects to obey, observe, and comply with any order, direction, or requirements of the commission heretofore or hereafter passed, shall forfeit to the State of Georgia a sum not more than five thousand dollars for each and every offense, the amount to be fixed by the presiding judge. Every violation of the provisions of this section or any preceding act, or of any such order, direction or requirement of the railroad commission shall be a separate and distinct offense, and, in case of a continued violation, every day a violation thereof takes place shall be deemed a separate and distinct offense. An action for the recovery of such penalty may be brought in the county of the principal office of such corporation or company in this State, or in the county of the State where such violation has occurred and wrong shall be perpetrated, or in any county in this State through which said corporation or company operates, or

where the violation consists of an excessive charge for the carriage of freight or passengers, or service rendered, in any county in which said charges are made, or through which it was intended that such passengers or freight should have been carried or through which such corporation operates, and shall be brought in the name of the State of Georgia by direction of the Governor. Any procedure to enforce such penalty shall be triable at the first term of the court at which it is brought and shall be given precedence over other business by the presiding judge, and the court shall not be adjourned until such proceeding is legally continued or disposed of. The decision in such cases may be taken to the Supreme Court as now provided in such cases of the grant or refusal of injunctions by judges of the superior courts.

SEC. 2668. *Penalties for aiding and abetting in violations of rules.*—Every officer, agent, or employee of any such common carrier, corporation, or company who shall violate, or procures, aids, or abets any violation by any such common carrier or corporation or company, of any provision of this section, or which shall fail to obey, observe, or comply with any order of the commission, or who procures, aids, or abets any such common carrier or corporation or company in its failure to obey, observe, and comply with any such order, direction, or provision shall be guilty of a misdemeanor, and shall be subject to prosecution in any county in Georgia in which said common carrier or corporation or company or officer, agent, or employee violates the provisions of this section or any provision of any order of the commission, or in any county through which said corporation operates. Any officer, agent, or employee shall also be subject to indictment under the provisions of this section, in any county in which a subordinate agent or employee of the company violates the provisions of this section, by the approval or direction of such officer, agent, or employee; and the agent or employee who locally, in any county violates the rules or directions of said commission in pursuance of the direction or authority of his superior officer or agent of

said company, may be called as a witness, and be compelled to testify, showing the authority by which he acted, and such testimony shall not be used against such subordinate employee or agent, nor shall he thereafter be subject to indictment for said offense.

SEC. 2669. *Penalties applicable to all orders of the commission.*—The penalties prescribed by this section and the procedure to enforce the same are made applicable to any and all violations of the rules, orders, and regulations established by the commission.

7

Supreme Court of the United States

OCTOBER TERM, [redacted] 1914

No. [redacted] 27

WADLEY SOUTHERN RAILWAY COMPANY
Plaintiff in Error
vs.
THE STATE OF GEORGIA

In Error to the Supreme Court of the State of Georgia

BRIEF FOR THE DEFENDANT IN ERROR

T. S. FELDER,
Attorney General of Georgia
JAMES K. HINES,
Attorneys for Defendant in Error

(23,137)

Supreme Court of the United States

OCTOBER TERM, 1913

No. 223

WADLEY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error

vs.

THE STATE OF GEORGIA

In Error to the Supreme Court of the State of Georgia

BRIEF FOR THE DEFENDANT IN ERROR

I.

THE JUDGMENT OF THE SUPREME COURT OF GEORGIA, AFFIRMING THE JUDGMENT OF THE SUPERIOR COURT OF JEFFERSON COUNTY, GEORGIA, DOES NOT DENY TO THE PLAINTIFF IN ERROR EQUAL PROTECTION OF THE LAWS, AND DOES NOT TAKE ITS PROPERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

No precise definition of due process of law has ever been formulated by this Court.

Davidson vs. New Orleans, 96 U. S. 97.
Missouri P. R. Co. vs. Humes, 115 U. S. 512, 519.
Dent vs. West Virginia, 129 U. S. 114, 123.
Holden vs. Hardy, 169 U. S. 366, 369.
Orient Ins. Co. vs. Daggs, 172 U. S. 557, 563.
French vs. Barber Asphalt Paving Co., 121 U. S. 324, 329.
Ballard vs. Hunter, 204 U. S. 241, 255.

Due process of law implies and requires conformity to those immutable and fundamental principles of justice which inhere in the very idea of free government.

Murray vs. Hoboken Land, etc., Co., 18 How. 272, 277.
Davidson vs. New Orleans, 96 U. S. 97.
Hurtado vs. California, 110 U. S. 516.
Davis vs. Texas, 139 U. S. 651, 652.
Iowa Central R. Co., vs. Iowa, 160 U. S. 389, 393.
Chicago, etc., R. Co. vs. Chicago, 166 U. S. 266.
Ballard vs. Hunter, 204 U. S. 241, 255.

When notice and opportunity for a hearing are given, the fundamental idea of due process of law is complied with.

Lasere vs. Rochereau, 84 U. S. 437.
The McVeigh vs. U. S., 17 Wallace 267.

Due process of law secures a citizen against any arbitrary deprivation of his property.

Hagar vs. Reclamation District, 111 U. S. 701, 707.
Tracy vs. Ginzberg, 205 U. S. 170, 178.

Section 6 of the Railroad Commission Act of 1907 (Civil Code 1910 Sec. 2663) contemplates that notice and an opportunity for a hearing be given to persons, railroads, or other corporations interested in the orders issued by the Commission, and that provision may be made for such notice either by statute or rule of the Commission. This section is to be construed to mean that the Commission shall not issue a special order in a particular case, directed to any person or corporation, without first giving notice and an opportunity for a hearing to the person or corporation so to be affected thereby.

Wadley Southern Railway Co. vs. State, 137 Ga. 497.
Civil Code of Georgia (1911) Sec. 2663.

This Court is bound by the construction put upon this statute of Georgia by its Supreme Court.

It is the province of the Supreme Court of a State to construe its own Constitution and Laws.

Columbus Southern Ry. Co. vs. Wright, 151 U. S. 470, 475.
Louisville & etc. R. Co. vs. Kentucky, 183 U. S. 503, 508.
Barrington vs. Missouri, 205 U. S. 483, 486.
West vs. Louisiana, 194 U. S. 258, 261.

We submit that there is nothing in the record in this case which shows that the Wadley Southern Railway Company has been deprived of its property without due process of law.

Mr. Justice Field has well said:

> "But, from the number of instances in which these words are invoked to set aside the legislation of the States, there is abundant evidence, as observed by Mr. Justice Miller in the case referred to, 'that there exists some strange misconception of the scope of this provision, as found in the XIV Amendment.' It seems, as he states, to be looked upon as a means of bringing to the test of the decision of this Court, the abstract opinions of every unsuccessful litigant in a State Court, of the justice of a decision against him, and of the merits of the legislation on which such decision may be founded. This language was used in 1877, and now, after the lapse of eight years, it may be repeated with an expression of increased surprise at the continued misconception of the purpose of the provision."
>
> Missouri P. R. Co. vs. Humes, 115 U. S. 512, 524.

This surprise may still be expressed at this late date.

II.

SECTIONS 2667 AND 2668 OF THE CODE OF GEORGIA ARE NOT REPUGNANT TO THE 14TH AMENDMENT, BECAUSE THE PENALTIES THEREIN PRESCRIBED ARE SO ENORMOUS AND EXCESSIVE THAT THEY PREVENT ANY INQUIRY INTO THE VALIDITY OR REASONABLENESS OF ANY ORDER OF THE RAILROAD COMMISSION OF GEORGIA; AND THUS AMOUNT TO A DENIAL TO PARTIES AFFECTED THEREBYOF THE EQUAL PROTECTION OF THE LAW.

When statutes prescribe penalties which are so enormous and overwhelming as to amount to a denial of the equal protection of the laws, they are unconstitutional and void.

Cotting vs. Stock Yards Co., 183 U. S. 79.
Chicago Ry. Co. vs. Minnesota, 134 U. S. 418.
Ex Parte Young, 209 U. S. 123.
Wilcox vs. Consolidated Gas Co., 212 U. S. 23, 53, 54.

A State Railroad Statute, which imposes such excessive penalties, that parties affected thereby are deterred from testing its validity in the Courts, denies to the carrier equal protection of the law.

Ex Parte Young, 209 U. S. 124.

Do these sections of the Code of Georgia fall within this class of vicious statutes?

Section 2667 declares that any common carrier or other corporation or person therein named, "which shall violate any provision of this section or the acts heretofore passed, or which fails, omits, or neglects to obey, observe, and comply with any order, direction, or requirements of the Commission heretofore or hereafted passed, shall forfeit to the State of Georgia a sum not more than five thousand dollars for each and every offense, the amount to be fixed by the presiding judge.

Every violation of the provisions of this section or any preceding act, or of any such order, direction, or requirement of the Railroad Commission shall be a separate and distinct offense, and, in case of a continued violation, every day a violation thereof takes place shall be deemed a separate and distinct offense."

Civil Code of Georgia (1911) Sec. 2667.

The language, "every violation of the provisions of this section or any preceding act, or of any such order, direction, or requirement of the Railroad Commission shall be a separate and distinct offense," adds no cumulative penalties. The language, "in case of a continued violation, every day a violation thereof takes place shall be deemed a separate and distinct offense," provides for cumulative penalties.

Penal statutes are to be construed strictly.

United States vs. Athens Armory, 35 Ga. 344.
Renfroe vs. Colquitt, 74 Ga. 618, 619.
Austin vs. State, 71 Ga. 595.

Does not the proper construction of the language, " in case of a continued violation," mean a violation of this law after a penalty has been inflicted? If this is the proper construction to be put on this statute, then it is clearly not objectionable on the ground that the penalties are too extreme.

The safeguards thrown around the persons and corporations affected by this statute are such as to rob it of the charge of imposing such enormous and grossly excessive penalties as to render it unconstitutional.

In the first place, such persons and corporations are entitled to a hearing before the Railroad Commission of Georgia.

Wadley Southern Ry. Co. vs. State, 137 Ga. 497.

In the second place, provision is made for the institution of suit against the Railroad Commission of Georgia, when its acts are illegal and unconstitutional.

Civil Code of Georgia (1911), Sec. 2625.

In the third place, no suit can be brought against any person or corporation under this statute until directed by the Governor of the State.

In the fourth place, the penalty shall consist of a sum not more than $5,000 for each and every offense, the amount to be fixed by the presiding judge. With all these safeguards thrown around persons and corporations affected by this statute, it cannot be said that the penalties are so enormous and excessive as to deprive persons and corporations, affected thereby, of the equal protection of the law.

Section 2668 of the Civil Code (1911) of Georgia does not provide for cumulative penalties at all. Offenders against this section are only guilty of misdemeanors, and can only be punished as such.

Civil Code of Georgia (1911) Sec. 2668.

A misdemeanor is punishable by a fine not to exceed $1,000, imprisonment not to exceed six months, work on the chaingang not to exceed twelve months, or any one or more of these punishments in the discretion of the judge.

Penal Code of Georgia (1911), Sec. 1065.

There is a vast difference between the statute involved in this case and the statutes involved in the case of Ex Parte Young, 209 U. S. 123.

In the first place, the Minnesota Statutes fixed hard and fast maximum rates without any notice or opportunity to the carriers to be heard as to their reasonableness.

In the second place, no opportunity was by these statutes given to the carriers affected by these rates to appeal to the State or other Courts for redress.

In the third place, the trial judges had no discretion in fixing the amounts of the penalties to be imposed.

In the fourth place, the penalties imposed by the Minnesota laws were more onerous than those imposed by this statute of Georgia.

It was provided by the Revised Laws of Minnesota, 1905, Section 1987, that any common carrier, who violated the provisions of that section or wilfully suffered any such unlawful act or omission, when no specific penalty is imposed therefor, "if a natural person, shall be guilty of a gross misdemeanor, and shall be punished by a fine of not less than $2,500, nor more than $5,000 for the first offense; and not less than $5,000 nor more than $10,000 for each subsequent offense; and, if such carrier or warehouseman be a corporation, it shall forfeit to the State for the first offense not less than $2,500 nor more than $5,000, and for each subsequent offense not less than $5,000 nor more than $10,000."

Under the Georgia Law the minimum penalty for any offense, whether a first or subsequent offense, may be as small as $1.00. Under the Minnesota Law the minimum penalty for the first offense was not less than $2,500, and the minimum penalty for a subsequent offense was not less than $5,000.

Under the Georgia Law the presiding judge is vested with a very large discretion as to the amount of penalty which can be imposed for its violation. Under the Minnesota Law the trial judge had to impose for the first offense a sum not less than $2,500, and for a subsequent offense a sum not less than $5,000. Under the Georgia Law no suit can be brought for a penalty unless first directed by the Governor of the State. Under the Minnesota Law suit could be brought without such direction.

On April 4, 1907, the Legislature of Minnesota passed an Act fixing two cents a mile as the maximum passenger rate to be charged by the railroads in Minnesota. It was provided in this Act that "any railroad company, or officer, agent or representative thereof, who shall violate any provision of this Act shall be guilty of a felony, and upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by punishment in the State Prison for a period not exceeding five years, or both fine and punishment."

In this Minnesota Statute a low maximum passenger rate of two cents per mile was absolutely fixed without opportunity

to its railroads to be heard as to its reasonableness. No opportunity is given by this Act to the railroads to contest the same in the Courts of Minnesota, or otherwise. Its violation is declared to be a felony, and the punishment is fixed at a sum not less than $5,000. or by imprisonment in the State Prison for a period not exceeding five years, or both fine and imprisonment.

Under the Georgia Law the offense is made a misdemeanor, and the punishment is by a fine not to exceed $1,000, by imprisonment not to exceed six months, or by work on the chaingang not to exceed twelve months, or one or more of these offenses in the discretion of the trial judge.

By the Minnesota Law the offense is a felony, with all the consequences thereof. In Georgia the offense is only a misdemeanor.

On April 18, 1907, the Legislature of Minnesota passed an Act establishing rates for the transportation of certain commodities between stations within that State. By Section 6 of this Act it is provided that "any officer, director, traffic manager or agent or employee of any such railroad company who violates any of the provisions of this section, or who counsels, advises or abets in such railroad company to violate any provisions of this section, shall be guilty of a misdemeanor and may be punished therefor in any county in which any railroad extends, and in which it has a station, and upon conviction be punished by imprisonment in the county jail for a period not exceeding ninety days.

Under this Mninesota Statute a person convicted of its violation must be imprisoned in the county jail. There is no alternative money punishment. Under the Georgia Statute the offender can pay a fine and escape imprisonment.

For the above reasons we submit that there is a vast difference between the penalties imposed by the Minnesota Statutes, and the penalties imposed by the Georgia Statutes.

III.

THE SUPREME COURT OF GEORGIA DID NOT ERR IN NOT HOLDING THE ORDER OF THE RAILROAD COMMISSION REPUGNANT TO THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, BECAUSE THIS ORDER, IN SUBSTANCE AND EFFECT, FORCES PLAINTIFF IN ERROR TO ENTER INTO A CONTRACT WITH THE MACON, DUBLIN AND SAVANNAH RAILROAD COMPANY, WHICH IT DOES NOT DESIRE TO MAKE AND WHICH IT CANNOT BE COMPELLED TO MAKE.

In the first place, this order does not require the defendant to enter into any contract with the Macon, Dublin and Savannah Railroad Company. In speaking of this order the Supreme Court of Georgia well says:

> "Nor is its purpose and effect to require any independent contractual relation between the defendant and another carrier. Though the collection of the entire freight charge at destination implies an obligation to account for the connecting carriers' share of it, nevertheless this is but one incident of a course of business voluntarily adopted by the carrier, whereby facilities respecting the interchange of freight are afforded to one connecting carrier, and denied to another connecting carrier, in contravention of the statute against unjust discrimination. The imperative quality of the order is to prohibit the defendant from favoring one carrier to the injury of another, and of the public, where conditions as to the service are substantially alike in both cases. It is to prevent a discrimination which practically deprives the merchants of Adrian of any competition in rates and service, because of the defendant's favoritism to the carrier on one end of the line, and the refusal of the same privileges to the carrier at the other end of the line. Where conditions are substantially the same, the denial by a carrier to one of its connections of the same facilities for the interchange of freight accorded to one connecting carrier, which practically deprives points on its line of the opportunity of competition in service and rates, is an unjust discrimination.

A., T. & S. R. vs. D. & N. O. R., 110 U. S. 667; B. & O. R. Co. vs. Adams Ex. Co., 22 Fed. 404; Ala. & V. Ry. Co. vs. Miss R. Com., 203 U. S. 496 (27 Sup. Ct. 163, 51 L. ed 289); Diamond Mills Co. vs. B. & M. R. Co., 9 I. C. C. R. 311.

And it is within the power of the Commission to make rules and regulations preventing unjust discrimination in the transportation of freight. Augusta Brokerage Co. vs. Central Ry. Co., 121 Ga. 48 (48 S. E. 714)."

Wadley Southern Ry Co. vs. State, 137 Ga. 497, 507, 508.

Logan vs. Central R., 74 Ga. 684.

Macon, D. & S. R. Co. vs. Graham, 117 Ga. 555.

IV.

THE SUPREME COURT OF GEORGIA DID NOT ERR IN HOLDING THAT THIS ORDER WAS NOT IN VIOLATION OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, BECAUSE WHEN PLAINTIFF IN ERROR ENTERED INTO A CONTRACT WITH THE CENTRAL OF GEORGIA RAILWAY COMPANY FOR AN EXCHANGE OF BUSINESS BETWEEN THEM AT WADLEY, IT DID NOT DO SO AT THE PERIL OF BEING COMPELLED TO ENTER INTO A SIMILAR CONTRACT WITH OTHER RAILROADS AT OTHER POINTS.

What has been said under the foregoing section of this brief applies equally to this contention of the plaintiff in error.

But freedom of contract is a qualified and not an absolute right. There is no absolute freedom to contract as one chooses.

Chicago, Burlington & Quincy R. Co. vs. McGuire, 219 U. S. 549.

L. & N. R. R. Co. vs. Mottley, 219 U. S. 467.

This right is subject, in the field of state action, to the essential authority of government to maintain peace and se-

curity, and to enact laws for the promotion of health, safety, morals and welfare of those subject to its jurisdiction.

Chicago, B. & Q. R. R. Co. vs. McGuire, 219 U. S. 568.

The Government may deny liberty of contract by regulating or forbidding any contract reasonably calculated to injuriously affect the public interest.

Atlantic Coast Line R. R. Co. vs. Riverside Mills, 219 U. S. 186.

There remains to the States the exercise of power appropriate to their territorial jurisdiction in making suitable provision for local needs.

The State may create and regulate local facilities, and adopt protective means of a reasonable character in the interest of the health, safety, morals and welfare of its people; although Interstate Commerce may incidentally or indirectly be involved.

The Minnesota Rate Cases, 230 U. S. 352, 353.

V.

THE THIRD OBJECTION TO THE VALIDITY OF THIS ORDER, SET OUT IN THE THIRD GROUND OF THE ASSIGNMENT OF ERROR, IS NOT WELL TAKEN.

Whosoever devotes his property to a public use subjects the same to reasonable public control and regulation.

Munn vs. Illinois, 94 U. S. 113.
Chicago etc. R. Co. vs. Wellman, 143 U. S. 339, 344.
Atlantic C. L. R. Co. vs. North Carolina Corporation. Commission, 206 U. S. 1.
Minneapolis etc. R. Co. vs. Minnesota, 186 U. S. 257, 264.

Independent of statute, every common carrier must carry for all to the extent of its capacity without undue or unreasonable discrimination either in charges or facilities.

Atchison etc. R. Co. vs. Denver etc. R. Co. 110 U. S. 667, 674.

The Wadley Southern Railway Company and Central of Georgia Railway Company are separate, independent corporations, which owe certain duties both to other carriers and to the public. The fact that the Central of Georgia Railway Company is interested in the Wadley Southern Railway Company, does not justify the latter in discriminating against the Macon, Dublin and Savannah Railroad, one of its connecting carriers, and against shippers over the latter road, in favor of the Central of Georgia Railway Company and shippers over that line, where the conditions are alike and similar.

T. S. FELDER,
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JAMES K. HINES.
Attorney for the State of Georgia.

here is whether an order requiring a railroad company to cease de
manding payment in advance from one carrier and not from anothe
violates the due process provisions of the Fourteenth Amendment.

Although the particular section which authorizes an order of a stat
railroad commission may not provide for a hearing, if the state cour
has construed that section as part of the law establishing the commis
sion and which does require hearings, that section is not unconstitu
tional under the Fourteenth Amendment as denying an opportunity
to be heard; and so *held* as to the Georgia Railroad Commission Law.

An order of the Georgia State Railroad Commission, requiring
railroad to desist from demanding freight in advance on merchan
dise received from one carrier while it accepts merchandise of th
same character at the same point from another carrier without such
prepayment, being otherwise legal, is not so arbitrary and unreason
able as to be violative of the due process clause of the Fourteenth
Amendment.

A State has power to impose penalties sufficiently heavy to secure
obedience to orders of public utility commissions after they have been
found lawful or after the parties affected have had ample opportunity
to test the validity of administrative orders and failed so to do.

A party affected by a statute passed without his having an opportunity
to be heard is entitled to a safe and adequate judicial review of the
legality thereof. It is a denial of due process of law if such review
can be effected by appeal to the courts only at the risk of having
to pay penalties so great that it is better to yield to orders of un-
certain legality than to ask the protection of the law. *Ex parte
Young*, 209 U. S. 123.

Where, after reasonable notice of the making of an administrative
order, a carrier fails to resort to the safe, adequate and available
remedy of testing its validity in the courts and makes an unsuccessful
defense by attacking such validity when sued for the penalty, it is
subject to the penalty.

137 Georgia, 497, affirmed.

ADRIAN, Georgia, a station on the Wadley Southern Railway, is 10 miles from Rockledge, where the road connects with the Macon & Dublin R. R., and 27 miles from Wadley, where it connects with the Central of Georgia Railway. In consequence of this connection with both roads, goods could be shipped from Macon to Adrian, over either route. It was, however, to the interest of the

Wadley Southern to have such freight routed via the Central, because it thereby secured the haul of 27 miles from Wadley to Adrian instead of the 10-mile haul when goods were routed via Rockledge. In addition to this, the Central owned all of the stock in the Wadley Southern and allowed it more than a mileage proportion in the division of the through rate. For these reasons, the Wadley made the Central its preferred connection and received from it goods for Adrian without requiring the prepayment of freight, while refusing at Rockledge, to receive goods shipped from Macon over the Macon & Dublin R. R. unless the charges to Adrian were prepaid. Merchants shipping via Rockledge contended that this was an unjust discrimination and made complaint to the Railroad Commission, which, after "hearing evidence and argument of counsel," passed an order, dated March 12, 1910, requiring "the Wadley Southern to desist from such discrimination, and on and after the receipt of the order, to afford shippers via Rockledge, the same facilities for the interchange of freight that was afforded shippers over the line of the Central, via Wadley." On March 14, 1910, a copy of this order was received by the Wadley Southern, which however did not institute any proceeding to test its validity in the courts of Fulton County having jurisdiction of "suits against the Commission or its orders" (Ga. Code, § 2625). Instead, the company, on April 4, 1910, notified the Commission that it would decline to comply with the order on the ground that it was void. Accordingly, on May 26, 1910,—more than two months after the order was served,—a penalty suit was brought against the carrier by the State, in which it was alleged that, on *divers* days, the Wadley Southern had violated the order of the Commission and asking that a *single* penalty "not to exceed $5,000" should be imposed under the terms of the act of August 26, 1907 (Laws, 1907, p. 72). That statute provides (§ 12, p. 79) that all corporations

and persons subject to the public utility law "shall comply with every order made by the Commission *under authority of law*," and any corporation or person which neglects to comply with such order shall "forfeit to the State of Georgia not more than five thousand dollars for each and every offense, the amount to be fixed by the presiding judge. Every violation . . . of any such order shall be a separate and distinct offense" and, "*in case of the continued violation, every day the violation thereof takes place shall be deemed a separate and distinct offense.*"

In its answer to this penalty suit the Wadley Southern denied that it had been guilty of any unjust discrimination and contended that the order of the Commission, and the statute, on which it was based, in violation of the provisions of the Fourteenth Amendment, took property without due process of law, and also that the penalty statute operated to deny the carrier the equal protection of the law. In the trial before a jury there was testimony on the question as to whether there had been any discrimination and whether any difference in treatment was not justified by the difference in conditions. There was also evidence tending to show that the business of some shippers, through Rockledge, had suffered in consequence of the delay and expense incident to the requirement that freight on goods consigned to Adrian should be prepaid at Wadley. The jury returned a verdict in favor of the State and the judge imposed a fine of $1,000 on the defendant. The case was then taken to the Supreme Court of Georgia, where the judgment was affirmed (137 Georgia, 497), and the case is here on a writ of error, which raises the question as to whether the order and the statute under which it was made violate the provisions of the Fourteenth Amendment.

Mr. T. M. Cunningham, Jr., with whom *Mr. A. R. Lawton* was on the brief, for plaintiff in error:

The statutes of the State of Georgia which impose the penalties and punishments for violation of an order of the Railroad Commission are contrary to the Fourteenth Amendment, as denial of due process of law and equal protection of the law. *Ex parte Young*, 209 U. S. 123; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19.

The constitutionality of a statute is to be determined not according to the grace or favor of the officials who act under it, but according to terms of the statute itself. *Security Trust Co.* v. *Lexington*, 203 U. S. 323; *Georgia Railway* v. *Wright*, 207 U. S. 127, 138; *Roller* v. *Holly*, 176 U. S. 409.

The order of the Railroad Commission is contrary to the Fourteenth Amendment, in that it is an arbitrary and unreasonable exercise of the police power of the State and beyond the same, and in substance and effect deprives the plaintiff in error of its property without due process of law and denies it the equal protection of law. *Oregon Ry. & N. Co.* v. *Fairchild*, 224 U. S. 510, 528; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611.

The case is not one of unjust discrimination. *Gamble-Robinson Co.* v. *C. & N. W. Ry.*, 168 Fed. Rep. 161; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. Ry.*, 59 Fed. Rep. 400; *S. C.*, aff'd, 63 Fed. Rep. 775; *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 Fed. Rep. 407; *Randall* v. *Richmond & D. R. Co.*, 108 N. Car. 612, 13 S. E. Rep. 137; *Oregon Short Line* v. *Northern Pac.*, 51 Fed. Rep. 465; *S. C.*, aff'd, 61 Fed. Rep. 158; *Coles* v. *Central R. R.*, 86 Georgia, 251, 255; *State of Georgia* v. *W. & T. R. R.*, 104 Georgia, 437. And see *Central R. R.* v. *Augusta Brokerage Co.*, 122 Georgia, 646, 650.

There are constitutional limits to what can be required of the owners of railroads under the police power. Requiring the expenditure of money takes property whatever may be the ultimate return for the outlay. *Missouri Pac. Ry.* v. *Nebraska*, 217 U. S. 196; *Oregon Ry. & N. Co.* v.

WADLEY SOUTHERN RAILWAY COMPANY *v.* GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 27. Argued January 30, 1914.—Decided January 11, 1915.

The general common-law rule that a carrier has the option of demanding freight in advance or on delivery applies not only to the shipper but also to the connecting carrier; but *quære* how far this rule may be or has been modified by statutes prohibiting discrimination.

This court, being bound by the construction given by the highest state court to a statute of the State, *holds* that the statute of Georgia involved in this case gives power to the State Railroad Commission to require a railroad to treat all connecting carriers alike in regard to payment of freight in advance or on delivery, and the only question

Fairchild, 224 U. S. 510; *Missouri Pac. Ry.* v. *Nebraska*, 164 U. S. 403; *Louisville & Nashville R. R.* v. *Central Stock Yards*, 212 U. S. 132. See also *Central Stock Yards* v. *L. & N. R. R.*, 192 U. S. 568.

The denial of due process of law and the taking of property in this case consists of compelling the plaintiff in error to act in a fiduciary capacity and as a collecting agent for the other roads and compels its clerks, which it pays, to work in the interest of its own and against the interest of other roads; or, if the charges are advanced, it takes money out of the pocket of the plaintiff in error to pay the other road freight charges. This is a direct and substantial taking of property.

The order of the Railroad Commission cannot be justified under the guise of the police power. It subserves no real public interest.

Mr. James K. Hines, with whom *Mr. T. S. Felder*, Attorney General of the State of Georgia, was on the brief, for defendant in error.

MR. JUSTICE LAMAR, after making the foregoing statement of facts, delivered the opinion of the court.

1. As a general rule, the carrier has the option to demand payment of freight in advance or on delivery. And, as there is a lien on the goods to secure the payment of charges, it is often a matter of indifference whether the freight is collected at the beginning or at the end of the transportation. The law has therefore always recognized that the company could exercise the one option or the other according to the convenience of the parties, the course of trade, the sufficiency of the goods to pay the accruing charges, and other like considerations.

2. What was true between carrier and shipper was

likewise true between carrier and its connections. But there is a conflict in the authorities as to how far this common-law right has been modified by those statutes, which, while not requiring absolute uniformity, do prohibit unjust discrimination. On the one hand, it is argued that the carrier has the right to make connections, establish joint routes and through rates for the purpose of facilitating and increasing its business. As an incident of this right it is said that the carrier may enforce the common-law rule and accept goods with or without the prepayment of freight, its decision being determined by the relation between the two companies, the amount of business interchanged, the solvency of the carrier against which the balance generally exists, the latter's promptness in settlement, and other like matters which, while aiding some of the carriers, do not increase the rates charged to the shipper in whose interest the laws against discrimination have been passed. Among the cases which hold that such difference in treatment is not an unjust discrimination, prohibited by statute, is *Gulf, Col. &c. Ry.* v. *Miami Steamship Co.*, 86 Fed. Rep. 407. There the Circuit Court of Appeals for the Fifth Circuit held that, under the Interstate Commerce Law, a common carrier might demand prepayment from one connection and not from another. *Cf. Atchison &c. R. R.* v. *Denver &c. R. R.*, 110 U. S. 667. A different view of the question has been taken by other courts (*Adams Express Co.* v. *State*, 161 Indiana, 328), including the Supreme Court of Georgia, which, in the present case, held that the statute, requiring railroads to furnish customary facilities for the interchange of freight empowering the Commission to prevent unjust discrimination, authorized that body to pass an order directing the Wadley Southern Railroad to discontinue the practice of requiring the Macon & Dublin Railroad to prepay freight to Adrian, while making no such demand from the Central Railway. This construction of the state statute is binding

here and leaves for consideration the question as to whether such an order violated the provisions of the Fourteenth Amendment.

3. On that branch of the case the Wadley Southern has made many assignments of error. It contends, in effect, that without due process of law the order deprives it of the liberty of contract; takes from it a valuable right of property and deprives it of the profit it could have made in the exercise of the long-recognized common-law right to demand prepayment of freight from one connection without being compelled to make a similar demand from all other connections.

The section of the Code under which the order was made did not expressly provide for notice and an opportunity to be heard; but the Supreme Court of Georgia held that it must be construed in connection with other parts of the Railroad Commission law which did contain such provisions. As said in *Louis. & Nash. R. R.* v. *Garrett*, 231 U. S. 298, 313, "It may be assumed that the statute of Kentucky forbade arbitrary action; it required a hearing, the consideration of the relevant statements, evidence and arguments submitted, and a determination by the Commission" as to whether the discrimination complained of was unjust. "But, on these conditions being fulfilled . . . the appropriate questions for the courts would be whether the Commission acted within the authority duly conferred by the Legislature . . . ; whether the Commission went beyond the domain of the State's legislative power and violated the constitutional rights of property by imposing confiscatory requirements." The Georgia court has likewise held that where the statute gave the Commission jurisdiction of the subject, its orders are binding unless shown to have been unreasonable, or to have violated some statutory or constitutional right. *Railroad Commission* v. *Louis. & Nash. R. R.*, 140 Georgia, 817 (6a), 836.

In this case the Commission dealt with a practice found to be unjustly discriminatory, but the order did not, as claimed, interfere with the carrier's legitimate right of management nor deprive it of any right of contract. It did not require the Wadley road, either at Rockledge or at Wadley, to receive, without prepayment of freight, goods whose value was insufficient to pay charges if the consignee should decline to accept them on arrival. Neither did it deprive the Wadley Southern of the right to solicit and encourage shipments via the Central. The order only prohibited a practice which had proved so preferential to some shippers and communities and so harmful to others as to amount to unjust discrimination. And while the Wadley Southern had the right to increase its earnings by encouraging shipments over the Central Railway so as to secure the longer haul and greater than mileage proportion of the joint rate, yet that right had to be exercised in subordination to the command of the statute prohibiting unjust discrimination. The Supreme Court of Georgia has ruled that the order was made in compliance with the requirements of the statute and was not unreasonable or arbitrary. That decision is controlling so far as the state law is concerned, and, there is, of course, nothing in the provisions of the Federal Constitution which prevents the States from prohibiting and punishing unjust discrimination of its patrons by a public carrier.

4. The Wadley Southern insists, however, that even if the Commission had the power to make the order, the judgment imposing a fine of $1,000 for its violation should nevertheless be set aside for the reason that the statute—authorizing so enormous a penalty as $5,000 a day for violating lawful orders of the Commission—operated to prevent an appeal to the courts by the carrier for the purpose of determining whether the order was lawful and, therefore, binding; or arbitrary and unreasonable, and therefore invalid. In support of this contention it

cites *Ex parte Young*, 209 U. S. 123, 163; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53.

It is, however, contended that those cases related to penalties for charging rates higher than those which had been established by the legislature without any hearing having been given to the carriers as to what were reasonable rates and are not applicable to a case like this, where the order was made after a full hearing had been given by the Commission to the Wadley Southern.

This contention would have been well founded if this and other hearings of a like nature before the Commission had resulted in orders which had the characteristics of a final judgment. But this was not so, for they were not conclusive. *Chicago &c. Ry.* v. *Minnesota*, 134 U. S. 418, 458. Their lawfulness was treated by the Georgia court in the present case as open to inquiry, when the Company was sued for the penalty. The question of their validity was also open to inquiry, in equity proceedings, in the state court, where they would have been set aside if found to be arbitrary and unreasonable, or to have violated some statutory or constitutional right. *Railroad Commission* v. *Louis. & Nash. R. R.*, 140 Georgia, 817 (6a), 836; *State of Georgia* v. *Western & Atlantic R. R.*, 138 Georgia, 835; *Southern Ry.* v. *Atlanta Sand Co.*, 135 Georgia, 35, 50. Such orders were also subject to attack in the Federal courts on the ground that the party affected had been unconstitutionally deprived of property. *Louis. & Nash. R. R.* v. *Garrett*, 231 U. S. 298, 313 and cases cited. And this right to a judicial determination exists whether the deprivation is by a rate statute—passed without a hearing (as in the *Young* and *Consolidated Gas Cases*); or by administrative orders of a Commission made after a hearing (as in the *Garrett Case, supra*). For rates made by the General Assembly or administrative orders made by a Commission are both legislative in their nature (*Garrett Case, supra; Grand Trunk R. R.* v. *Indiana Railroad Com-*

mission, 221 U. S. 400, 403) and any party affected by such legislative action is entitled, by the due process clause, to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution. *Chicago &c.* v. *Minnesota*, 134 U. S. 418, 458; *Chicago &c. Ry.* v. *Tompkins*, 176 U. S. 167, 174; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Missouri Pacific Ry.* v. *Nebraska*, 217 U. S. 196, 207; *Oregon R. R. & Nav. Co.* v. *Fairchild*, 224 U. S. 510; *San Joaquin Co.* v. *Stanislaus County*, 233 U. S. 459; *Bacon* v. *Rutland R. R.*, 232 U. S. 134; *Detroit &c. R. R.* v. *Michigan R. R. Com.*, 235 U. S. 402.

The methods by which this right to a judicial review are secured vary in different jurisdictions. In some States there is a provision that within a designated time the order may be reviewed by the courts on the evidence submitted to the Commission. *Oregon R. R. & Nav. Co.* v. *Fairchild*, 224 U. S. 510; *State ex rel. Railroad Commission* v. *Oregon R. R. & Nav. Co.*, 68 Washington, 160, 167; *Seward* v. *Denver & R. G. R. R.*, 17 New Mex. 557; 131 Pac. Rep. 980. *Cf. Oregon R. R. & Nav. Co.* v. *Campbell*, 173 Fed. Rep. 957, 989. In others by proceedings in equity. In the Federal courts the method of procedure, when administrative orders are attacked as unconstitutional, is now regulated by § 266 of the Judicial Code as amended (March 4, 1913, c. 160, 37 Stat. 1013, 1014). But in whatever method enforced, the right to a judicial review must be substantial, adequate and safely available—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law.

5. As statutes establishing Railroad Commissions and providing penalties for violations of legislative orders are of recent origin the cases discussing the subject are

comparatively few. See *Mercantile Trust Co.* v. *Tex. & Pacif. Ry.*, 51 Fed. Rep. 529 (4), 549 (14–15) (1892); *Louis. & Nash. R. R.* v. *McChord*, 103 Fed. Rep. 216, 225 (1900); *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79, 101 (1901); *Consolidated Gas Co.* v. *Mayer*, 146 Fed. Rep. 150, 154 (1906); *Ex parte Wood*, 155 Fed. Rep. 190 (1907); *Consolidated Gas Co.* v. *New York*, 157 Fed. Rep. 849 (1907); *Ex parte Young*, 209 U. S. 123 (1908); *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53 (1909); *Missouri Pacific Ry.* v. *Nebraska*, 217 U. S. 196, 207 (1910) (building spur tracks); *Missouri Pacific Ry.* v. *Tucker*, 230 U. S. 340, 349 (1913); *Bonnett* v. *Vallier*, 136 Wisconsin, 193 (15, 16); *Coal & Coke Ry.* v. *Conley*, 67 West Va. 129, 132, and the present case of *Wadley Southern Ry.* v. *State of Georgia*, 137 Georgia, 497.

These cases do not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to administrative orders, but they are all based upon the fundamental proposition that under the Constitution penalties cannot be collected if they operate to deter an interested party from testing the validity of legislative rates or orders legislative in their nature. Their legality is not apparent on the face of such orders but depends upon a showing of extrinsic facts. A statute therefore which imposes heavy penalties for violation of commands of an unascertained quality, is in its nature, somewhat akin to an *ex post facto* law since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands

of such disputable and uncertain legality the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid.

The first case which deals with the question, is *Mercantile Trust Co.* v. *Tex. & Pac. Ry.*, 51 Fed. Rep. 529 (4), 549 (14–15), decided in 1892. There statutory provisions imposing penalties tending to embarrass a party in appealing for protection against taking property without due process of law were held to be void. In *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79, 101 (1901), it was pointed out that an act which opened the doors of the courts but placed upon the litigant a penalty for failure to make good his defence, which was so great as to deter him from asserting that which he believed to be his right, was tantamount to a denial of the equal protection of the law.

Later the matter was elaborately discussed, most carefully considered and finally decided in *Ex parte Young*, 209 U. S. 123, where a statute fixed rates and, though it afforded no opportunity for a judicial hearing to determine whether the rates were confiscatory, yet imposed heavy and cumulative penalties for collecting other than those statutory rates—Those rates had not been established in pursuance of a plenary power of the legislature, but in view of constitutional limitations, the rates were valid only if they were found to be reasonable. Whether they were reasonable or not was not apparent on the face of the statute, but was dependent upon the proof of extrinsic facts. How doubtful and uncertain that then was, is illustrated by the fact that in the *Minnesota Rate Cases* (230 U. S. 352, 472, 473), these legislative rates were subsequently held to be confiscatory as to some carriers and as to others not confiscatory.

It was in the light of the fact that the penalty was im-

posed for charging other than those statutory rates, whose reasonableness was a matter of doubt and uncertainty, that this court in the *Young Case*, speaking through Mr. Justice Peckham, pointed out that a law which in terms or by the operation of deterrent penalties made statutes or orders of a Commission conclusive as to the sufficiency of rates would be unconstitutional. He summed up the discussion as follows (209 U. S. p. 147): "It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the Company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the Company from seeking judicial construction of laws which deeply affect its rights." Like views were expressed as to the invalidity of the heavy penalties involved in *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53. But the penalty provisions were separable and their invalidity did not defeat the balance of the statute (54).

The *Young* and *Consolidated Gas Cases* both related to rate statutes while in *Missouri Pacific Ry.* v. *Nebraska*, 217 U. S. 196, 207, the statute imposed a fine for the carrier's failure, on demand, to construct spur tracks to elevators. After showing that if the absolute requirement of the statute to build, was to be construed as being applicable only when the demand was reasonable, this court said that even on that construction the railroads must refrain from paying "at the peril of a fine, if they turn out wrong in their guess that in the particular case the court will hold the demand not authorized by the act. If the statute makes the mere demand conclusive, it plainly cannot be upheld. If it requires a side track only when the demand is reasonable, the railroad ought, at least, to be allowed a hearing in advance to decide whether the demand is within the act."

In *Missouri Pacific Ry.* v. *Tucker*, 230 U. S. 340, 349, the

question was presented in still a different aspect. The statutory rate on the shipment of oil involved in that case was $12 a barrel. The act provided that if the carrier charged in excess of such rates it should be liable to any person injured in the sum of $500 as liquidated damages, to be recovered by an action in any court of competent jurisdiction. The carrier instead of charging the statutory rate of $12 charged the old rate of $15.02 and the shipper sued to recover $500 as damages for collecting $3.02 too much. The act made no provision for a hearing in advance to determine whether the statutory rate of $12 was reasonable. The state court, however, held that as the statute did not forbid such judicial investigation the carrier had the right, when sued for a penalty, to defend by showing that the statutory rates were unreasonable. But, as was pointed out in the decision of this court, the right to a hearing by way of defense after the $15.02 had been collected, failed to recognize "the real plight of the carrier" (349). For, when the oil was tendered for shipment it had to be accepted at the rate of $12—and thus be illegally deprived of $3.02 if the statutory rate of $12 was confiscatory; or else, the carrier had to charge its existing rate of $15 and run the risk of having to pay more than a hundred times the amount of the overcharge if the new $12-rate was ultimately sustained. Of course the right to make a defense, at the risk of having to pay such an enormous penalty, was merely illusory. For, if such penal statutes were indeed constitutional, the carrier, in every instance, would submit to the deprivation of some of its property, under a rate of doubtful validity, rather than run the risk of paying out all of its property by way of penalties imposed in the event the rate should ultimately be sustained.

The Supreme Court of Wisconsin in *Bonnet* v. *Vallier*, 136 Wisconsin, 193 (15, 16), for the same reason, held a penalty statute void which imposed cumulative fines for

failing to comply with indefinite and uncertain regulations as to the construction of tenement houses.

The question also was carefully considered in *Coal & Coke Ry.* v. *Conley*, 67 W. Va. 129, 132, where it was held that enormous and accruing penalties could not be imposed for charging more than statutory rates of uncertain reasonableness.

6. In the light of this unbroken line of authorities, therefore, a statute like the one here involved (under which penalties of $5,000 a day could be imposed for violating orders of the Commission) would be void if access to the courts to test the constitutional validity of the requirement was denied; or, if the right of review actually given was one of which the carrier could not safely avail itself.

In considering that question in the present case, the constitutionality of the act involved, is not to be decided by the conduct of the plaintiff in error, nor by the fact that the State only asked a penalty for one day's disobedience instead of many. Neither can the statute be construed as a single legislative act. It must be treated as part of a system of laws creating the Railroad Commission, defining its powers and subjecting it to suit.

This point is brought out in the statement of the Brief of the Attorney General and counsel for the State, wherein it is said that "the safeguards thrown around persons and corporations affected by this [penalty statute] are such as to rob it of the charge of imposing such enormous and grossly excessive penalties as to render it unconstitutional. In the first place, such persons and corporations are entitled to a hearing before the Commission [a contention already discussed]. And, in the second place, provision is made for the institution of suits against the Railroad Commission of Georgia when its acts are illegal or unconstitutional (Civil Code of Georgia, 1911, § 2625)." From an examination of that section of the Code it is quite clear that it recognizes the right to a judicial review

of administrative orders. Until it has been given a contrary construction by the state court, it must be here construed in such a way as to leave it valid and as conferring that sort of right which furnishes the adequate and available remedy which meets the requirement of the Constitution. Any other construction would not only impute to the legislature an intent to deny the equal protection of the law and to permit the carrier to be deprived of property without due process of law, but it would operate to nullify the penalty section as a whole. Giving then § 2625 that construction which makes it constitutional and it appears that the laws of Georgia gave to the Wadley Southern R. R. Co. the right to a judicial review of the order of March 12, 1910, by a suit against the Commission.

7. The only question then left for determination is whether in view of such right, the penalty can be collected for the violation of an order not known to be valid at the date of the disobedience sought to be punished. On that question, little can be found in the books. But on principle, and on the authority of all that has been said on the subject, there is no room to doubt the power of the State to impose a punishment heavy enough to secure obedience to such orders after they have been found to be lawful; nor to impose a penalty for acts of disobedience, committed after the carrier had ample opportunity to test the validity of administrative orders and failed so to do.

In *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79, Justice Brewer first pointed out that there might be a distinction between punishing for acts done before and for those done after the validity of the rate statute had been settled, saying (p. 102):

"It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has

been a final determination of the validity of the statute, the question would be very different from that here presented."

Another case dealing more directly with the question is that of *Railroad Commission of Oregon* v. *Oregon R. R. & Nav. Co.*, 68 Washington, 160. The act there under consideration imposed a punishment for violating orders of the Commission but gave the carrier adequate and available remedy by conferring upon it the right to a hearing in court as to their legality, otherwise it was to be treated as conclusive. *Oregon R. R. & Nav. Co.* v. *Fairchild*, 224 U. S. 510. In a suit for the recovery of the statutory penalty for failing to build a station, as required by the Commission, the court said "the railroad company having failed to review the order as it was permitted to do under the act, the order became, in the language of the statute, 'final and conclusive.' . . ."

Coal & Coke Ry. v. *Conley*, 67 W. Va. 129, 132, contains a very full discussion of the subject. In that case the statute imposed a penalty for charging rates other than those prescribed in a legislative act, which, however, was altogether silent upon the subject of a judicial review as to the reasonableness of the rates. The court recognized that if that silence was to be construed into a denial of the right to a hearing in court the penalty provision would be void. It held however that the failure of the penalty statute to say anything about the right of review could not be construed into a denial of that right. That conclusion, and the further holding that penalties could not accrue while the question of the validity of the rates was being determined in appropriate judicial proceedings instituted in a Court of Equity for that purpose, is specially applicable here. For the Georgia Code, instead of being silent on the subject, contains a section which punishes a violation of "lawful orders," and another provision, in the same Chapter, which expressly contemplates that proceedings

may be brought against the Commission to test the validity of its orders.

If the Wadley Southern Railroad Company had availed itself of that right and—with reasonable promptness—had applied to the courts for a judicial review of the order, and if, on such hearing, it had been found to be void, no penalties could have been imposed for past or future violations. If in that proceeding, the order had been found to be valid, the carrier would thereafter have been subject to penalties for any subsequent violations of what had thus been judicially established to be a lawful order—though not so in respect of violations prior to such adjudication.

But, where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate and available remedy by which it could test in the courts its validity, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsuccessful.

The judgment of the Supreme Court of Georgia is

Affirmed.